Nos. 10589, 10590, 10591, 10592

United States Circuit Court of Appeals

For the Ninth Circuit.

No. 10589

NEW IDRIA QUICKSILVER MINING COMPANY, a Corporation,
Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

No. 10590

KLAU MINE, INC., a Corporation,
Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

No. 10591

OAT HILL MINE, INC., a Corporation,
Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

No. 10592

WILD HORSE QUICKSILVER MINING CO., a Corporation,
Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

Transcripts of the Record

Upon Petitions to Review Decisions of the Tax Court of the United States

Rotary Colorprint, 590 Folsom St., San Francisco

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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Appearances:

For Taxpayer:

ROBERT M. SEARLS, ESQ.,
JOHN F. GRIEDER, C.P.A.

For Comm'r:

HARRY R. HORROW, ESQ.,

Docket No. 112386.

NEW IDRIA QUICKSILVER MINING COMPANY, a corporation,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

DOCKET ENTRIES

1942

Sept. 8—Petition received and filed. Taxpayer notified. Fee paid.

Sept. 9—Copy of petition served on General Counsel.

Sept. 8—Request for Circuit hearing in San Francisco, filed by taxpayer. 9-9-42 Granted.

Oct. 16—Answer filed by General Counsel.

Oct. 16—Request for Circuit hearing in San Francisco, filed by General Counsel.

Oct. 19—Copy of answer and request served on taxpayer. San Francisco, Calif.

1943

Jan. 5—Hearing set Feb. 1, 1943 in San Francisco, California.

Jan. 16—Motion for leave to file amended answer, amended answer lodged, filed by General Counsel.

Jan. 20—Hearing set 2-1-43 on motion.

Feb. 4—Hearing had before Judge Smith on merits. Submitted. Motion of respondent for leave to file amended answer—granted. Amended answer filed. Dkts. 112386, 87, 88, and 89 consolidated. Stipulation of Facts filed. Petitioner's brief due 3-20-43. Respondent's brief 4-20-43. Reply brief 5-5-43.

Feb. 24—Transcript of hearing 2-4-43 filed.

Mar. 15—Brief filed by taxpayer. 3-15-43 Copy served on General Counsel.

Apr. 20—Reply brief filed by General Counsel. Served 4-21-43.

Apr. 29—Order granting extension to May 20, 1943 to file reply brief, entered.

May 17—Reply brief filed by taxpayer. 5-17-43 Copy served.

Jul. 14—Findings of Fact and opinion rendered. Judge Smith, Div. 5. Decision will be entered under Rule 50. 7-14-43 Copy served.

Aug. 10—Computation of deficiency filed by General Counsel.

Aug. 10—Consent to settlement filed by taxpayer (letter).

1943

Aug. 13—Decision entered. Smith, Judge. Div. 5.

Aug. 28—Motion to fix the amount of bond in the sum of $20,000.00 filed by taxpayer.

Sept. 6—Order fixing amount of bond in the amount of $20,000.00 entered.

Oct. 12—Bond in the amount of $20,000.00 approved and ordered filed.

Oct. 12—Petition for review by U. S. Circuit Court of Appeals 9th Circuit, with assignments of error filed by taxpayer.

Oct. 12—Proof of Service filed by taxpayer.

Oct. 12—Agreed statement of evidence filed.

Oct. 12—Agreed praecipe filed.

Oct. 12—Proof of service of praecipe filed. [1*]

United States Board of Tax Appeals

Docket No. 112386

NEW IDRIA QUICKSILVER MINING COMPANY, a corporation,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

PETITION

The above named petitioner hereby petitions for redetermination of the deficiency set forth by the

*Page numbering appearing at top of page of original certified Transcript of Record.

Commissioner of Internal Revenue in his Notice of Deficiency under the following symbols: I R A: 90-D-C W B: C: T S: P D: S F: M W B; dated June 30, 1942 and as a basis of this proceeding alleges as follows:

1. At all times herein mentioned New Idria Company was and is now, a corporation duly organized and existing under and by virtue of the laws of the State of Nevada, having its principal office and place of business in California, at the office of H. W. Gould & Co., 220 Montgomery Street, San Francisco, California. [2]

2. The Notice of Deficiency, a copy of which is attached hereto and marked Exhibit A, was mailed to petitioner on the 30th day of June, 1942.

3. Taxes in controversy are corporation income taxes for the taxable years ended June 30, 1939, 1940 and 1941 and in the amount of $10,143.16.

4. The determination of additional tax set forth in said Notice of Deficiency is based upon the following errors:

(a) The Commissioner has erred in computing the allowable depletion of the properties owned by petitioner for each fiscal year in question.

(b) The Commissioner has erred in his statement that the allowable depletion for each of the fiscal years in question has been based by him on 15% of the gross income from the property as used in United States Revenue Code Section 114-b.

(c) The Commissioner has erred in failing to determine the fair market value of the first marketable product from petitioner's mine as constituting

the gross income basis for the purpose of computing the percentage depletion under the provisions of Regulation 103 of the Bureau of Internal Revenue, section 1923 (m)-1, for each of the fiscal years in question.

(d) The Commissioner has erred in not accepting as the gross income from the property, as a basis for computing percentage depletion allowance to petitioner, the gross return from sales of mercury derived from this property in the amount of $323,018.72 for the fiscal year 1939, $597,813.50 for the fiscal year 1940, and $901,717.45 for the fiscal year 1941, which was returned by petitioner as constituting gross income from the property for the purpose of computing percentage [3] depletion for the respective years in question.

(e) The Commissioner has erred in deducting from the gross income from sales of quicksilver derived from petitioner's property during each of the years in question, the amounts claimed by Commissioner or any other amounts as truly representing the cost of furnacing (including the cost of condensing, cleaning and flasking) metal extracted from quicksilver ore mined and extracted from petitioner's property.

(f) The Commissioner has erred in subtracting from the gross income to petitioner from sales of quicksilver metal from petitioner's property during each of the fiscal years in question, the amount claimed by the Commissioner, or any other amount, as representing the proportion of petitioner's operating profit alleged to have been derived from

furnacing of quicksilver ore mined and extracted from petitioner's property (including the condensing, cleaning and flasking the metal contained in said ore).

(g) The Commissioner has erred in assuming as the basis for said deductions specified in assignments Nos. (e) and (f) that quicksilver ore was the first marketable product derived from petitioner's operations, whereas, in fact, quicksilver metal was and is the first marketable product derived from said operations.

(h) The Commissioner erred in assuming as a basis for said deduction No. (f) that any profit whatever was derived by petitioner from the furnacing, cleaning, condensation, flasking or transportation of said quicksilver so mined and extracted from petitioner's property during the period in question, instead of assuming that the profit in question was ascribable wholly to the existence of quicksilver ore in petitioner's mine, and of an open market for the metal extracted therefrom by said process.

(i) The Commissioner erred in assuming that either the gross income from the property or the [4] gross value of the first marketable product therefrom can be ascertained by adding to the cost of mining and crushing the ore a percentage of the net profit from sales equal to the proportion that the cost of mining and crushing bore to the total cost of mining, crushing, furnacing, condensing, cleaning, flasking and transporting the metal to market and all other costs of operation.

5. The facts upon which petitioner relies as the basis of this proceeding are as follows:

(a) Petitioner's gross income for the fiscal years in question was derived entirely from the sale of quicksilver metal mined and extracted from the New Idria Mine in San Benito County, California and amounted to $323,018.72 for the fiscal year 1939; $597,813.50 for the fiscal year 1940 and $901,717.45 for the fiscal year 1941. Petitioner's net income from its said operations as disclosed by its return for said taxable years before depletion deduction was $18,018.06 for the fiscal year 1939; $188,009.20 for the fiscal year 1940 and $244,353.60 for the fiscal year 1941. After computing said net returns petitioner deducted as allowable depletion of a metal mine under section 114 (b) 4 of the Internal Revenue Code, the sums of $9,009.03 for the fiscal year 1939; $89,672.03 for the fiscal year 1940, and $121,759.21 for the fiscal year 1941, which deductions were obtained by taking 15% of the gross income from the property as stated above for each year and where the result exceeded 50% of the net income prior to taking depletion, reducing the allowance to 50% net income.

(b) All of said gross income was derived from sales of quicksilver metal extracted from petitioner's New Idria Mine in San Benito County, California, and said metal was obtained by mining, transporting to the surface, sorting, crushing, and roasting cinnabar or quicksilver ore contained in said property in mine workings and in a furnacing plant situated on the property in [5] question; said

process of extracting the metal from said property was a continuous process and resulted in the extraction of the metal in vapor form from the ore in a furnace, whence the vapors were passed into condensers, condensed into liquid form in which quicksilver exists at normal temperatures, cleaned and poured in measured quantities into flasks. These flasks of quicksilver were transported to the market and sold.

(c) The cost of mining, sorting and crushing said quicksilver ore during said period was $248,202.85 for the fiscal year 1939, $322,047.87 for the fiscal year 1940, and $510,730.67 for the fiscal year 1941. The cost of furnacing said ore and condensing the mercury vapors derived from such operation, cleaning and storing the resultant liquid metal in flasks was $44,717.97 for the fiscal year 1939, $63,353.52 for the fiscal year 1940, and $113,932.05 for the fiscal year 1941. The cost of transporting said metal in said flasks to the market was $2,066.18 for the fiscal year 1939, $3,525.62 for the fiscal year 1940 and $4,688.57 for the fiscal year 1941.

(d) Petitioner is informed and believes and upon such information and belief alleges that in redetermining the petitioner's income tax for the fiscal years 1939, 1940 and 1941, the Commissioner determined the gross income basis for computing the percentage depletion deduction for each of said years by adding to the cost of mining and crushing the ore a percentage of net profit from sales equal to the proportion that the cost of mining and crushing bore to the total cost of mining, crushing, fur-

nacing, condensing, cleaning, flasking and transporting the metal to market and all other costs of operation. In so computing said gross income basis for depletion, the Commissioner in effect subtracted from the gross income from sales of metal mined and extracted from petitioner's mine during said period the cost of furnacing, condensing, cleaning, flasking and transporting said metal to market plus a percentage of profit arbitrarily assumed to be incident to said operations, leaving as the assumed gross income from the property only [6] the cost of mining and crushing the ore plus the remaining percentage of the net profit from metal sales determined as aforesaid. Petitioner alleges that said gross income basis assumed by the Commissioner was neither the gross income from the property nor the gross value at the mine of the first marketable product derived therefrom.

(e) The quicksilver ore or cinnabar as mined and extracted, sorted and crushed at petitioner's mine had no market nor market value and was not a marketable product for the reason that the percentage of quicksilver contained in said ore was so low that it would cost more to transport said ore to some point where it could be milled than the metal in the ore was worth. There are no custom mills or smelters in the United States who buy quicksilver ore either in its crude state or after sorting and crushing. The erection of a furnace, roasting of the ore, condensing the metal vapor and cleaning and pouring the liquid quicksilver into flasks is just as much a part of the extraction of the metal from

the mine in its first marketable form as is the operation of mining, breaking down and transporting the ore to the surface. The only form in which quicksilver is regularly marketed is in its liquid form, which is its natural condition at normal temperature, in metallic flask containers; the cost of furnacing, condensing, purifying the condensed vapors and storing the metal in flasks are all a part of the necessary cost of preparing the first marketable product from the mine, to-wit: quicksilver metal, for market. There is no such thing as a quicksilver concentrate or a quicksilver precipitate or any intermediate form of product which is marketable between the ore in place in the ground and the metal itself properly flasked for market.

(f) Petitioner's net profit realized from its mining operations during the years in question was prior to making any deduction for depletion allowance as alleged in para- [7] graph 5 (a) hereof. None of said profit was due to furnacing, condensing, purifying or flasking ore or metal in question. All of said profit, on the other hand, was due (1) to the existence of quicksilver ore in petitioner's property, and, (2) to a market value created for quicksilver by the laws of supply and demand in an open market. The cost of mining and treating the ore is a debit against profits which would be realized if the metal occurred in marketable form in its natural state in the mine. These costs had nothing whatever to do with the market price which determined the profit. There are no custom mills which make a profit from the beneficiation of quicksilver

ore as brought to the surface and no basis exists for the arbitrary assignment of a portion of the gross profit to the furnacing, condensing, flasking and marketing operations.

(g) Quicksilver is the only metal which exists in liquid form at normal temperatures and is one of the few metals whose ores have no market value in their crude form because of the low percentage of metal content as compared with the volume and weight of the waste products in the ore which have to be discarded in beneficiation. It is also one of the metals which do not pass through a concentrating process after preliminary crushing before being recovered in metallic form, that is, the metal is recovered on the premises, directly from the ore by the roasting process instead of through concentration.

By reason of the foregoing facts and specification of errors petitioner prays that this Board may hear this proceeding and grant petitioner an abatement of said additional assessment of taxes for each of the corporate years ending June 30, 1939, 1940, and 1941.

ROBERT M. SEARLS
Attorney for Petitioner
705 Standard Oil Bldg.
San Francisco, Calif.
JOHN F. GRIEDER (C.P.A.)
Tax Accountant for Petitioner
Mills Building,
San Francisco, Calif. [8]

State of California
City and County of San Francisco—ss.

H. W. Gould, being first duly sworn, says: that he is executive Vice President of petitioner corporation; that he is duly authorized to verify the foregoing petition; that he has read the foregoing petition and is familiar with the statements contained therein, and that the statements contained therein are true except those which are stated upon information and belief and that those he believes to be true.

H. W. GOULD

Subscribed and sworn to before me this 31st day of August, 1942

[Seal] MARIE FORMAN

Notary Public in and for the City and County of San Francisco, State of California [9]

SN-IT-1

EXHIBIT A

TREASURY DEPARTMENT

Internal Revenue Service
74 New Montgomery Street
San Francisco, California
Jun 30 1942

San Francisco Division
IRA:90-D-CWB
(C:TS:PD
SF:MWB)
New Idria Quicksilver Mining Company,
No. 10 Pent House, Mills Building,
San Francisco, California.

Gentlemen:

You are advised that the determination of your income tax liability for the taxable year(s) 1939, 1940 and 1941 discloses a deficiency of $10,143.16 as shown in the statement attached.

In accordance with the provisions of existing internal revenue laws, notice is hereby given of the deficiency mentioned.

Within 90 days (not counting Sunday or a legal holiday in the District of Columbia as the 90th day) from the date of the mailing of this letter, you may file a petition with the United States Board of Tax Appeals for a redetermination of the deficiency.

Should you not desire to file a petition, you are requested to execute the enclosed form and forward it to the Internal Revenue Agent in Charge, San Francisco, California for the attention of —Confer-

ence Section—. The signing and filing of this form will expedite the closing of your return(s) by permitting an early assessment of the deficiency, and will prevent the accumulation of interest, since the interest period terminates 30 days after filing the form, or on the date assessment is made, whichever is earlier.

Respectfully,
GUY T. HELVERING,
Commissioner,
By
/s/ F. M. HARLESS
Internal Revenue Agent in
Charge.

Enclosures:
Statement.
Form of waiver.
H.E.A.
Exhibit A [10]

(Copy)

STATEMENT

San Francisco
IRA:90-D
CWB
(C:TS:PD
SF:MWB)

New Idria Quicksilver Mining Company,
No. 10 Pent House, Mills Building
San Francisco, California.

Tax liability for the Taxable Years Ended June 30, 1939, June 30, 1940 and June 30, 1941.

Year Ended	Income Tax Liability	Assessed	Deficiency
June 30, 1939	$ 1,374.60	$ 1,186.26	$ 188.34
June 30, 1940	19,640.06	16,225.74	3,414.32
June 30, 1941	35,862.93	29,322.43	6,540.50
Total	$56,877.59	$46,734.43	$10,143.16

In making this determination of your income tax liability, careful consideration has been given to your protest of November 24, 1941, covering the fiscal year 1940 and to the statements made at the conferences held on December 3, 1941 and April 22, 1942.

A copy of this letter and statement has been mailed to your representative, Mr. John F. Grieder, Mills Building, San Francisco, California, in accordance with the authority contained in the power of attorney executed by you and on file in this office.

ADJSTMENTS TO NET INCOME

Year ended June 30, 1939

Net income as disclosed by return	$ 9,009.03
Unallowable deductions and additional income:	
(a) Excessive depletion	1,345.22
Net income adjusted	$10,354.25

[11]

EXPLANATION OF ADJUSTMENTS

(a) In your income and excess-profits tax return filed for the fiscal year ended June 30, 1939, there was claimed a deduction for depletion the sum of $9,009.03. Allowable depletion, based on 15 percent of the gross income from the property as defined in the law and regulations, has been redetermined in the amount of $7,663.81 and taxable income is accordingly increased by the amount of $1,345.22.

COMPUTATION OF TAX

Year ended June 30, 1939

Declared Value Excess-profits Tax:	
Taxable net income	$ 10,354.25
Less: 10 percent of $1,500,000.00 value of capital stock as declared in your capital stock tax return for year ended June 30, 1938	150,000.00
Net income subject to declared value excess-profits tax	None
Declared Value excess-profits tax	None
Declared Value excess-profits tax assessed	None

[12]

COMPUTATION OF TAX

Year ended June 30, 1939—(Continued)

Income Tax:		
Net income for declared value excess-profits tax computation		$ 10,354.25
Less: Declared value excess-profits tax		None
Adjusted net income		$ 10,354.25
Dividends received credit		None
Balance subject to income tax		$ 10,354.25
Portion (not in excess of $5,000) taxable at 12½%—$5,000.00		625.00
Portion (in excess of $5,000 and not in excess of $20,000) taxable at 14%—$5,354.25		$ 749.60
Taxable income tax assessable		$ 1,374.60
Income tax assessed:		
Original, Sept. 1939—Account No. 410039—First California District		1,186.26
Deficiency of income tax		$ 188.34

ADJUSTMENTS TO NET INCOME

Year ended June 30, 1940

Net income as disclosed by return		$ 98,337.77
Unallowable deductions and additional income:		
(a) Depletion disallowed	$18,469.67	
(b) Depreciation disallowed	1,034.99	19,504.66
Net income adjusted		$117,842.43

[13]

EXPLANATION OF ADJUSTMENTS

(a) In your income and excess-profits tax return filed for the fiscal year ended June 30, 1940, there was claimed as a deduction for depletion the

sum of $89,672.03. Allowable depletion, based on 15 percent of the gross income from the property as defined in the law and regulations, has been redetermined in the amount of $71,202.36 and taxable income is accordingly increased by the amount of $18,469.67.

(b) In your return you included in the deduction for depreciation the amount of $3,216.67 on the assets shown in Exhibit A. It is held that $2,181.68 is a reasonable allowance for depreciation of these assets during the taxable year. Your income is accordingly increased by $1,034.99.

COMPUTATION OF TAX

Year ended June 30, 1940

Declared Value Excess-profits Tax:		
Taxable net income		$117,842.43
Less:		
10 percent of $1,519,017.06 value of capital stock as declared in your capital stock tax return for year ended June 30, 1939	151,901.71	
Net income subject to declared value excess-profits tax	None	
Declared value excess-profits tax	None	
Declared value excess-profits tax assessed	None	

[14]

Income Tax:		
Net income for declared value excess-profits tax computation		$117,842.43
Less: Declared value excess-profits tax	None	
Adjusted net income		$117,842.43
Tentative tax at 19 percent		$ 22,390.06

COMPUTATION OF TAX

Year ended June 30, 1940—(Continued)

Less: 2½ percent of the dividends paid credit $110,000.00 (not to exceed 2½ percent of adjusted net income)	2,750.00
Total income tax assessable	$ 19,640.06
Income tax assessed:	
Original, Sept. 1940—Account No. 400036—First California District	16,225.74
Deficiency of income tax	$ 3,414.32

ADJUSTMENTS TO NET INCOME

Year ended June 30, 1941

Net income as disclosed by return		$121,759.22
Unallowable deductions and additional income:		
(a) Excessive depletion	$26,834.50	
(b) Excessive depreciation	45.92	
(c) Sale of equipment	728.15	
(d) Interest paid	61.10	27,669.67
Net income adjusted		$149,428.89

[15]

Explanation of Adjustments

(a) In your income and excess-profits tax return, Form 1120, filed for the fiscal year ended June 30, 1941, there was claimed as a deduction for depletion the sum of $121,759.21. Allowable depletion, based on 15 percent of the gross income from the property as defined in the law and regulations, has been redetermined in the amount of $94,924.71 and taxable income is accordingly increased by the amount of $26,834.50.

(b) In your return you claim a deduction in the amount of $20,754.55 for depreciation. It is

held that $20,708.63, the deduction as claimed in your amended return, is a reasonable allowance for depreciation for the taxable year. Your income is accordingly increased by $45.92.

(c) In your amended return you report income in the amount of $728.15 from the sale of spare equipment. Since this income is not included in your original return your taxable income is increased by $728.15.

(d) In your return you claim a deduction in the amount of $779.27 for interest. The information submitted in your amended return indicates that $718.17 is the correct deduction for interest paid or accrued during the taxable year. The net income reported in your return is therefore increased by $61.10.

COMPUTATION OF TAX

Year ended June 30, 1941

Declared Value Excess-profits Tax:	
Taxable net income	$149,428.89
Less: 10 percent of $3,000,000.00 value of capital stock as declared in your capital stock tax return for year ended June 30, 1940	300,000.00
Net income subject to declared value excess-profits tax	None
Total declared value excess-profits tax	None
Declared value excess-profits tax assessed	None

[16]

COMPUTATION OF TAX

Year ended June 30, 1941

Income Tax:		
Net income for declared value excess-profits tax computation		$149,428.89
Less: Declared value excess-profits tax		None
Normal tax net income		$149,428.89
Income tax 22.1 percent of $149,428.89		$ 33,023.78
Income defense tax 1.9 percent of $149,428.89		2,839.15
Total income and income defense taxes assessable		$ 35,862.93
Income tax assessed:		
Original Sept. 1941 list, Account No. 410065—First California District	$29,222.21	
Additional Oct. 1941 list, amended return—Account No. 410701	100.22	$ 29,322.43
Deficiency of income and income defense taxes		$ 6,540.50

[17]

EXHIBIT A

DEPRECIATION SCHEDULE

Assets acquired July 3, 1936	Cost	Depreciation to June 30, 1939	Remaining Cost	Remaining Life	Year ended June 30, 1940 Depreciation Claimed	Allowed
Compressor House Contents	$ 1,050.00	$ 560.00	$ 490.00	3 years	$ 210.00	$ 163.33
Mechanical Shops	750.00	450.00	300.00	3 years	150.00	100.00
Generator Shed	3,750.00	1,875.00	1,875.00	3 years	750.00	625.00
Store Building	500.00	300.00	200.00	3 years	100.00	66.67
Fuel Oil Tanks and Lines	200.00	120.00	80.00	3 years	40.00	26.67
Reduction Plant Building	5,000.00	3,000.00	2,000.00	3 years	1,000.00	666.67
2-Insley 3/8 yd. shovels	2,000.00	999.99	1,000.01	3 years	666.67	333.34
Camp Buildings	1,500.00	900.00	600.00	3 years	300.00	200.00
Total	$14,750.00	$8,204.99	$6,545.01		$3,216.67	$2,181.68
Depreciation claimed						3,216.67
Depreciation allowed						2,181.68
Exeessive depreciation						$1,034.99

[Endorsed] U.S.B.T.A. Filed Sept. 8, 1942. [18]

The Tax Court of the United States

Docket No. 112386

NEW IDRIA QUICKSILVER MINING COMPANY,

Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

AMENDED ANSWER

Comes now the Commissioner of Internal Revenue, respondent above named, by his attorney, J. P. Wenchel, Chief Counsel, Bureau of Internal Revenue, and for amended answer to the petition filed by the above-named petitioner admits, denies and alleges as follows:

1 and 2. Admits the allegations contained in paragraphs 1 and 2 of the petition.

3. Denies the allegations contained in paragraph 3 of the petition; alleges that the deficiencies asserted by the Commissioner in his notice of deficiency are income taxes in the respective amounts of $188.34 and $3,414.32 for the fiscal years ended June 30, 1939, and June 30, 1940; and $6,540.50 income and defense taxes for the fiscal year ended June 30, 1941, and that all of said taxes are in controversy, together with the following amounts of increased deficiencies claimed by the respondent: [19]

Fiscal year ended June 30	Tax	Increased Deficiency
1939	Income	$ 37.71
1940	Income	1,718.78
1941	Income and defense	3,339.44

4(a) to (i), inclusive. Denies that the Commissioner erred as alleged in subparagraphs (a) to (i), inclusive, of paragraph 4 of the petition.

5(a) to (g), inclusive. Denies the allegations contained in subparagraphs (a) to (g), inclusive, of paragraph 5 of the petition.

6. Denies generally and specifically each and every allegation in the petition not hereinbefore admitted, qualified or denied.

7. Further answering and by way of asserting a claim for increased deficiencies respondent alleges as follows:

(a) During the fiscal years ended June 30, 1939; June 30, 1940; and June 30, 1941, petitioner sold quicksilver which was extracted from ores and other materials which were not crude ores in place mined by petitioner, in which petitioner had an economic interest. Said ores and materials consisted of (1) crude low-grade ores which were mined by the owners and operators of petitioner's mining property prior to its acquisition by petitioner, and deposited by them on the surface of said property; and (2) the ores which were so mined and were processed by furnacing operations by the owners and operators of the property prior to [20] its acquisition by petitioner and deposited by them on the surface of said property.

(b) In arriving at the deficiencies involved in this proceeding, the Commissioner erroneously determined that all of the quicksilver sold by petitioner during the taxable years in question had been extracted from crude ores in place mined by petitioner from its mining property. In the notice of deficiency in respect of which the petition herein has been filed, the Commissioner erroneously allowed petitioner deductions for percentage depletion as follows:

Fiscal year ended June 30	Amount
1939	$ 7,663.81
1940	71,202.36
1941	94,924.70

(c) During the taxable years in question, the petitioner realized gross proceeds from the sale of quicksilver extracted from ores and materials which were not crude ores in place mined by petitioner as follows:

Fiscal year ended June 30	Amount
1939	$ 57,844.18
1940	80,700.00
1941	110,489.70

Respondent erroneously failed to exclude said amounts of said sales and costs incurred by petitioner during said years allocable thereto in determining the deductions for percentage depletion [21] for the taxable years in question allowed to petitioner in the deficiency notice.

(d) The gross income realized by petitioner during the taxable years in question from its mining

property, for purposes of computing percentage depletion, was as follows:

Fiscal year ended June 30	Gross Income
1939	$223,393.93
1940	423,146.35
1941	634,898.87

The net income realized by petitioner therefrom for said taxable years, for purposes of computing percentage depletion, was as follows:

Fiscal year ended June 30	Net Income
1939	$ 14,788.87
1940	131,732.10
1941	162,020.80

(e) Fifteen per centum of said gross income, not to exceed fifty per centum of said net income, for each of the taxable years in question is as follows:

Fiscal year ended June 30	Amount
1939	$ 7,394.43
1940	63,471.95
1941	81,010.40

[22]

Said amounts are the amounts of percentage depletion allowable to petitioner for each of the taxable years in question, and respondent erroneously understated petitioner's taxable net income by excessive deductions for percentage depletion for each of said years allowed in the deficiency notice as follows:

Fiscal year ended June 30	Amount
1939	$ 269.38
1940	7,730.41
1941	13,914.31

(f) By reason of the foregoing erroneous allowances for percentage depletion during the taxable years in question respondent erroneously determined that there were due from petitioner the deficiencies set forth in the notice of deficiency instead of the following deficiencies which are due:

Fiscal year ended June 30	Tax	Amount
1939	Income	$ 226.05
1940	Income	5,133.10
1941	Income and defense	9,879.94

Wherefore, it is prayed that petitioner's appeal be denied and that there be found to be due from this petitioner the deficiencies determind in the notice of deficiency plus additional amounts of income taxes for the fiscal years 1939 and 1940 and income and defense taxes for the fiscal year 1941 as follows: [23]

Fiscal year ended June 30	Increased Deficiency
1939	$ 37.71
1940	1,718.78
1941	3,339.44

Claim for said increased deficiencies is hereby asserted, or such lesser increased amounts as the Court may find to be due by reason of any errors that may have been committed by the Commissioner.

(Signed) J. P. WENCHEL
A.C.B.
Chief Counsel,
Bureau of Internal Revenue.

Of Counsel:
Alva C. Baird,
Division Counsel;

T. M. Mather,
Harry R. Horrow,
Special Attorneys,
Bureau of Internal Revenue.

HRH:sob 1/12/43.

[Endorsed]: T.C.U.S. Filed Feb. 4, 1943. [24]

The Tax Court of the United States

Docket No. 112386

NEW IDRIA QUICKSILVER MINING COMPANY, a Nevada corporation,
Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

STIPULATION OF FACTS

It is hereby stipulated by and between the parties hereto that the following facts shall be taken to be true in the above-entitled proceeding and received as evidence therein:

1. Petitioner is a corporation, organized under the laws of the State of Nevada on July 3, 1936, with its principal office and place of business at No.

10 Penthouse, Mills Building, San Francisco, California.

2. Petitioner kept its books of account and filed its Federal income tax returns on the accrual basis and on the basis of a fiscal year ending June 30. Petitioner filed its Federal income and declared-value excess profits tax returns for the fiscal years ended June 30, 1939, June 30, 1940, and June 30, 1941, with the Collector of Internal Revenue for the First District of California, at San Francisco, California. [25]

3. Since its incorporation and thereafter throughout the taxable years in question, the petitioner owned in fee certain mining property located southeast of Hollister, in San Benito County, California. Said property included a quicksilver mine, plant and equipment for the extraction of quicksilver.

4. During the taxable years in question, petitioner realized gross proceeds from sales of quicksilver in flasks as follows:

Fiscal Year	Amount
Ended June 30, 1939	$323,018.72
" " 30, 1940	$597,813.50
" " 30, 1941	$901,717.45

5. Said quicksilver was extracted from crude ores mined from said property by petitioner, containing cinnabar, a chemical compound of mercuric sulphide and from low-grade dump ores, and ores containing cinnabar which had been mined and processed by former owners and operators of petitioner's mining property. All of said owners and

operators were predecessors in interest of petitioner, in the title to said property, and none of them were stockholders of or otherwise interested in the organization or ownership of the petitioner corporation.

6. During the years in question, the crude ores, containing cinnabar, which were mined by petitioner, were extracted from subterranean workings developed by drifts and crosscuts, the ores being broken by blasting and thereafter sorted. The ore which did not contain cinnabar was discarded and the remainder hauled to the surface by cars. Said crude ores were screened and crushed [26] into small particles of 2 inches or less and hauled by conveyor to two furnaces located on petitioner's property.

7. Said furnaces are made of iron, lined with firebrick, and are cylindrical in shape, five feet in diameter and fifty-six feet in length. The furnaces are of a rotary type, revolving at a speed of about one revolution per minute.

8. The crushed ores are fed into said furnaces which are heated at the opposite ends to a temperature of some 1200° Fahr. As the ores pass through the furnaces the mercury contained in the cinnabar is freed from the sulphur by vaporizing. The gases containing the vaporized mercury are drawn off by means of suction fans at the feed end of the furnaces. Said gases thereupon pass into a condensing system, consisting of two banks of 16 inch cast iron pipes, 30 feet high, with 10 pipes per bank. At the bottom of the pipes there are rubber

buckets into which are deposited mercury and soot when the gases are condensed. The remaining gases leave the condensing system and pass into redwood tanks. The mercury and soot collected in the buckets are treated with lime, placed on a table, and worked with a hoe until as much mercury as possible is freed. The soot remaining after the hoeing process is refed into the furnaces. The mercury thus freed is collected in a pot, measured in metal containers, called flasks, which hold 76 pounds of mercury. These flasks are then transported by petitioner to San Francisco where they are sold.

9. During the taxable years in question, the gross sales realized by petitioner from the sale of quicksilver extracted from [27] crude ores mined by it, and the cost of mining, sorting, crushing and furnacing said ores, and condensing, cleaning and transporting the quicksilver obtained therefrom, as described in paragraphs 6 to 8, inclusive, are correctly shown on Exhibit A, attached to this stipulation.

10. During the taxable years in question there were located on petitioner's mining property large dumps of crude ores containing cinnabar which had been mined from the underground workings of the mining property owned by petitioner. Said ores were mined by the predecessors in interest of petitioner in the title of said property, prior to its acquisition by petitioner. Said dumps were created by mining operations which commenced in or about the year 1858 and continued practically without intermission up to the time that petitioner acquired

the properties in 1936. During the course of said mining operations extending over said period, dumps were built up on the surface of the mine premises at a point about a mile and one-half from petitioner's plant. Title to the land on which the dumps were situated, and to the land on which petitioner's plant is situated, was vested at all times since the creation of said dumps in one ownership, and title to said ownership passed continuously from owner to owner, through the years since said dumps were created, down to petitioner, who acquired the property in 1936 by purchase. At no time during said period was title to the dumps, or any right to work them, severed or separated by conveyance, lease, or otherwise from the title to land on which the mine whence the ore came is situated.

[28]

During the taxable years in question ores from said dumps were removed therefrom by power shovels by petitioner, placed in trucks, and transported to petitioner's plant located on the same property, where they were crushed, furnaced, and treated for the metal therein contained, as above described. Because the mining of ore in more recent years had been more efficient and the separation of ores more efficient, the superficial layers of said dumps consisted almost entirely of waste. In order to obtain the ores in said dumps from which quicksilver could be profitably extracted due to incomplete separation methods used in earlier mining of the property and to higher prices of quicksilver which prevailed during the years in question, peti-

tioner was compelled to and did remove by power shovel large quantities of waste on the top of said dumps before being able to remove the more valuable ore lying underneath in said dumps. The ores removed from said dumps, as aforesaid, were crushed, roasted, and the mercury vapors condensed, cleaned, flasked, and transported in identically the same manner as were the ones taken from the subterranean workings of the mine, as described in paragraph 6 of this stipulation.

11. During the taxable years in question there were located on petitioner's property ores containing cinnabar which had been mined from said property by the former owners thereof in the same manner as described in paragraph 10 hereof, and run through furnaces located thereon prior to the acquisition of the property by petitioner. Said so-called roasted cinnabar ores had been dumped [29] on the surface of the property owned by petitioner, and had been left on said property without any severance of title thereto, in the same manner as were the mine dump ores described in paragraph 10 of this stipulation. Petitioner removed said roasted cinnabar ores from said burned ore dumps by power shovels, fed them into its furnaces and extracted the mercury therefrom which had not been extracted by the older process used by petitioner's predecessors in interest, through utilization of the processes described in paragraphs 6 to 8, inclusive, of this stipulation. Due to the quantities of superficial waste which petitioner has been compelled to remove, both from the mine dumps and

the burned ore dump, and due to the ability of petitioner's manager to positively identify the ore and burned ore which is now being taken from said dumps as having been placed there at a time when former less efficient furnaces were in use, it is agreed that the ore taken from said dumps by petitioner during the years in question here, had been placed there prior to the year 1913, and that no previous claims for depletion thereof have previously been made in any income tax returns.

12. During the taxable years in question, the gross sales of the quicksilver extracted from the dump ores referred to in paragraph 10 above, and from the roasted cinnabar ores referred to in paragraph 11 hereof, and the costs of removing, sorting, crushing, and furnacing of said ores, and the condensing, cleaning and transportation of the mercury extracted therefrom, were as shown on Exhibit B attached hereto. [30]

13. In the petitioner's income and declared-value excess profits tax returns for the fiscal years ended June 30, 1939, 1940 and 1941. petitioner elected to claim percentage depletion and claimed and computed deductions for depletion in said returns as follows:

	1939	1940	1941
Gross Income from property	$323,018.72	$597,813.50	$901,717.45
15% of gross income	48,452.81	89.672.03	135,257.62
Net income (before depletion)	18,018.06	188,009.80	244,353.60
Depletion claimed	9,009.03	89,672.03	122,176.80

In computing said depletion deduction, petitioner assumed as the gross income from the property the gross proceeds from the sale of quicksilver derived therefrom, as shown in Paragraph 4 hereof, and made no segregation or deduction of returns from quicksilver obtained from ores removed from the dumps referred to in Paragraphs 10, 11, and 12 hereof.

14. In arriving at the deficiencies involved in this proceeding, respondent disallowed depletion for the fiscal years 1939, 1940, and 1941 in the respective amounts of $1,345.22; $18,469.67, and $26,-834.50. Respondent allowed depletion for said years in the respective amounts of $7,663.81; $71,-202.36; and $94,924.71. Said amounts of depletion were computed by respondent as shown on Exhibit "C" attached hereto.

15. By amended answer filed in this proceeding, respondent alleges that he erred in the deficiency notice in determining that the income attributable to the sale of quicksilver obtained from the dump ores and the roasted ores referred to in Paragraphs 10 [31] and 11 hereof, respectively, constituted gross income from the petitioner's mining property for purposes of percentage depletion. If the income obtained by petitioner from the sale of quicksilver during the years in question obtained from the dump ores referred to in Paragraphs 10 and 11 hereof were omitted from the gross income of petitioner for the purpose of computing depletion, and if the methods shown on Exhibit "C" hereto were used in computing the amount of allowable per-

centage depletion of petitioner's property for the years in question, the results would be as shown on Exhibit "D" attached hereto.

16. The right is reserved by each party hereto to introduce any additional evidence not contrary to the facts herein stipulated.

Dated: January 27th, 1943.

ROBERT M. SEARLS
705 Standard Oil Building,
San Francisco, California.
Attorney for Petitioner

JOHN F. GRIEDER
(C.P.A.)
Mills Building,
San Francisco, Cal.
Tax Accountant for
Petitioner

(J. P. Wenchel)
Chief Counsel, Bureau of Internal Revenue.
Counsel for Respondent.

[32]

EXHIBIT A

Exhibit A (Excludes Dump Ores)

YEAR ENDED JUNE 30, 1939

(New Idria Quicksilver Mining Company)

I. Gross Sales			$265,174.54
II. Costs			
1. Mining and sorting	$174,083.76		
2. Crushing and screening	5,796.30		
3. Depreciation pertaining to 1 and 2	4,374.45		
4. General expenses allowable to items 1 and 2	23,815.52		
Total	208,070.03		
Add costs attributable to opening inventory	5,067.33		
	213,137.36		
Deduct costs attributable to closing inventory	4,532.30		
Cost items 1 to 4 as adjusted by inventory		$208,605.06	
5. Furnacing	20,006.03		
6. Condensing	5,099.68		
7. Cleaning, flasking and transportation	4,522.57		

Exhibit A—(Continued)

Year Ended June 30, 1939—(Continued)

II.	Costs—(Continued)			
	8. Depreciation allocable to items 5 to 7	1,996.36		
	9. General expenses allocable to items 5 to 7	5,107.87		
	Total	36,732.51		
	Add costs attributable to opening inventory	1,416.57		
		38,149.08		
	Deduct costs attributable to closing inventory	1,002.87		
	Costs, 5 to 9 as adjusted by inventory		37,146.21	
	Total costs, 1 to 9 inclusive			245,751.27
III.	Gross sales less items 1 to 9 inclusive			$ 19,423.27

Exhibit A—(Continued)

YEAR ENDED JUNE 30, 1940

I. Gross Sales			$517,113.14
II. Costs			
1. Mining and sorting	$244,531.40		
2. Crushing and screening	8,062.58		
3. Depreciation pertaining to 1 and 2	4,686.43		
4. General expenses allocable to items 1 and 2	34,203.20		
Total	291,483.61		
Add costs attributable to opening inventory	4,532.30		
	296,015.91		
Deduct costs attributable to closing inventory	4,601.66		
Cost items 1 to 4 as adjusted by inventory		$291,414.25	
5. Furnacing	34,090.00		
6. Condensing	6,579.23		
7. Cleaning, flasking and transportation	11,212.32		
8. Depreciation allocable to items 5 to 7	8,396.39		
9. General expenses allocable to items 5 to 7	4,777.41		
Total	65,055.35		

Exhibit A—(Continued)

Year Ended June 30, 1940—(Continued)

II. Costs—(Continued)			
Add costs attributable to opening inventory	1,002.99		
	66,058.34		
Deduct costs attributable to closing inventory	1,342.10		
Costs, 5 to 9 as adjusted by inventory		64,716.24	
Total costs, 1 to 9 inclusive			356,130.49
III. Gross sales less items 1 to 9, inclusive			$160,982.65

[34]

Exhibit A—(Continued)

YEAR ENDED JUNE 30, 1941

I.	Gross Sales		$791,227.75
II.	Costs		
	1. Mining and sorting	$390,862.00	
	2. Crushing and screening	7,059.87	
	3. Depreciation pertaining to 1 and 2	7,371.26	
	4. General expenses allocable to items 1 and 2	62,983.28	
	Total	468,276.41	
	Add costs attributable to opening inventory	4,601.66	
		472,878.07	
	Deduct costs attributable to closing inventory	.....	
	Cost items 1 to 4 as adjusted by inventory		$472,878.07
	5. Furancing	68,770.66	
	6. Condensing	10,216.74	
	7. Cleaning, flasking and transportation	10,526.45	
	8. Depreciation alloeable to items 5 to 7	9,237.06	
	9. General expenses allocable to items 5 to 7	16,260.91	
	Total	115,011.82	

Exhibit A—(Continued)

Year Ended June 30, 1941—(Continued)

II. Costs—(Continued)			
Add costs attributable to opening inventory	1,342.10		
	116,353.92		
Deduct costs attributable to closing inventory	.....		
Costs, 5 to 9, as adjusted by inventory		116,353.92	
Total costs, 1 to 9, inclusive			589,231.99
III. Gross Sales less items 1 to 9, inclusive			$201,995.76

EXHIBIT B

Exhibit B (Dump ores)

FISCAL YEAR ENDED JUNE 30, 1939

I. Gross Sales			$ 57,844.18
II. Costs			
1. Removing, sorting, crushing and screening	$ 23,420.00		
2. General expenses allocable to item 1	14,119.37		
3. Depreciation allowable	2,593.45		
Total items 1 to 3	40,132.82		
Add costs attributable to opening inventory	1,113.85		
	41,246.67		
Deduct costs attributable to closing inventory	996.24		
Total costs, items 1 to 3 as adjusted by inventory		$ 40,250.43	
4. Furnacing	11,860.86		
5. Condensing	1,120.96		
6. Cleaning, flasking and transportation	994.11		
7. General expenses allocable to items 4 to 6	3,028.28		

Exhibit B—(Continued)

Fiscal Year Ended June 30, 1939—(Continued)

II. Costs—(Continued)			
8. Depreciation allowable to items 4 to 6	1,183.58		
Total items 4 to 8	18,187.79		
Add costs attributable to opening inventory	309.61		
	18,497.40		
Deduct costs attributable to closing inventory	220.59		
Total costs, items 4 to 8 as adjusted by inventory		18,276.81	
Total costs 1 to 8, inclusive			58,527.24
III. Gross sales less items 1 to 8, inclusive (loss)			$ (683.06)

[36]

Exhibit B—(Continued)

FISCAL YEAR ENDED JUNE 30, 1940

I. Gross Sales			$ 80,700.36
II. Costs			
1. Removing, sorting, crushing and sereening	$ 17,337.00		
2. General expenses allocable to item 1	11,633.30		
3. Depreciation allowable	1,593.96		
Total items 1 to 3	30,564.26		
Add costs attributable to opening inventory	996.24		
	31,560.50		
Deduct costs attributable to closing inventory	718.18		
Total costs, items 1 to 3 as adjusted by inventory		$ 30,842.32	
4. Furnacing	11,596.17		
5. Condensing	1,026.82		
6. Cleaning, flasking and transportation	1,749.90		
7. General expenses allocable to items 4 to 6	2,855.81		
8. Depreciation allowable to items 4 to 6	1,624.91		
Total items 4 to 8	18,853.61		

Exhibit B—(Continued)

Fiscal Year Ended June 30, 1940—(Continued)

II. Costs—(Continued)			
Add costs attributable to opening inventory	220.47		
	19,074.08		
Deduct costs attributable to closing inventory	209.46		
Total costs, items 4 to 8 as adjusted by inventory		18,864.62	
Total costs 1 to 8, inclusive			49,706.94
III. Gross sales less items 1 to 8, inclusive			$ 30,993.42

[37]

Exhibit B—(Continued)

FISCAL YEAR ENDED JUNE 30, 1941

I. Gross Sales			$110,489.70
II. Costs			
1. Removing, sorting, crushing and screening	25,710.00		
2. General expenses allocable to item 1	15,549.49		
3. Depreciation allowable	1,819.83		
Total items 1 to 3	43,079.32		
Add costs attributable to opening inventory	718.18		
	43,797.50		
Deduct costs attributable to closing inventory	.....		
Total costs, items 1 to 3 as adjusted by inventory		$ 43,797.50	
4. Furnacing	16,978.29		
5. Condensing	1,426.27		
6. Cleaning, flasking and transportation	1,469.50		
7. General expenses allocable to items 4 to 6	4,014.54		
8. Depreciation allowable to items 4 to 6	2,280.48		
Total items 4 to 8	26,169.08		

Exhibit B—(Continued)

Fiscal Year Ended June 30, 1941—(Continued)

II. Costs—(Continued)			
Add costs attributable to opening inventory	209.46		
	26,378.54		
Deduct costs attributable to closing inventory	.....		
Total costs, items 4 to 8 as adjusted by inventory		26,378.64	
Total costs 1 to 8, inclusive			70,176.04
III. Gross sales less items 1 to 8, inclusive			$ 40,313.66

[38]

EXHIBIT C

Exhibit C (Deficiency computations)

FISCAL YEAR ENDED JUNE 30, 1939

I.	Gross sales (Exhibit A plus Exhibit B)		$323,018.72
II. (A)	Total costs prior to furnacing, items 1 to 4, inclusive, of Exhibit A plus Exhibit B	$248,855.49	
(B)	Total other costs, items 5 to 9, inclusive of Exhibit A plus Exhibit B	55,423.02	
	Total costs of extraction and sale of quicksilver		304,278.51
III.	Operating profit		$ 18,740.21
IV. (A)	Ratio of costs prior to furnacing to total costs	.8179	
(B)	Ratio of other costs to total costs	.1821	
V.	Profits attributable by respondent in deficiency notice to furnacing, condensing, cleaning, flasking and transportation of quicksilver	18,740.21 x .1821	3,412.59
VI. (A)	Gross income from property, item I less items II (B) and V		264,183.11
(B)	Net income from property, item III less item V		15,327.62
VII. (A)	15% of gross income, item VI (A)		39,627.47
(B)	50% of net income, item VI (B)		7,663.81
VIII.	Depletion allowed in deficiency notice		$ 7,663.81

Exhibit C—(Continued)

FISCAL YEAR ENDED JUNE 30, 1940

I.	Gross sales (Exhibit A plus Exhibit B)		597,813.50
II. (A)	Total costs prior to furnacing, items 1 to 4, inclusive, of Exhibit B plus Exhibit B	$322,256.57	
(B)	Total other costs, items 5 to 9, inclusive of Exhibit A plus Exhibit B	83,584.86	
	Total costs of extraction and sale of quicksilver		405,841.43
III.	Operating profit		$191,972.07
IV. (A)	Ratio of costs prior to furnacing to total costs	.7940	
(B)	Ratio of other costs to total costs	.2060	
V.	Profits attributable by respondent in deficiency notice to furnacing, condensing, cleaning, flasking and transportation of quicksilver	191,972.07 x .2060	39,546.25
VI. (A)	Gross income from property, item I less items II (B) and V		474,682.39
(B)	Net income from property, item III less item V		152,425.82
VII. (A)	15% of gross income, item VI (A)		71,202.36
(B)	50% of net income, item VI (B)		76,212.91
VIII.	Depletion allowed in deficiency notice		$ 71,202.36

Exhibit C—(Continued)

FISCAL YEAR ENDED JUNE 30, 1941

I.	Gross sales (Exhibit A plus Exhibit B)		901,717.45
II. (A)	Total costs prior to furnacing, items 1 to 4, inclusive, of Exhibit A and Exhibit B	$516,675.57	
(B)	Total other costs, items 5 to 9, inclusive of Exhibit A and Exhibit B	142,732.46	
	Total costs of extraction and sale of quicksilver		659,408.03
III.	Operating profit		$242,309.42
IV. (A)	Ratio of costs prior to furnacing to total costs	.7835	
(B)	Ratio of other costs to total costs	.2165	
V.	Profits attributable by respondent in deficiency notice to furnacing, condensing, cleaning, flasking and transportation of quicksilver	$242,309.42 x .2165	$ 52,459.99
VI. (A)	Gross income from property, item I less items II (B) and V		706,525.00
(B)	Net income from property, item III less item V		189,849.43
VII. (A)	15% of gross income, item VI (A)		105,978.75
(B)	50% of net income, item VI (B)		94,924.71
VIII.	Depletion allowed in deficiency notice		$ 94,924.71

EXHIBIT D

FISCAL YEAR ENDED JUNE 30, 1939

(Respondent's amended computations, excluding dump ores)

I.	Gross sales (Exhibit A)		$265,174.54
II. (A)	Total costs prior to furnacing, items 1 to 4, inclusive, of Exhibit A	$208,605.06	
(B)	Total other costs, items 5 to 9, inclusive, of Exhibit A	37,146.21	
	Total costs of extraction and sale of quicksilver		245,751.27
III.	Operating profit		$ 19,423.27
IV. (A)	Ratio of costs prior to furnacing to total costs	.8488	
(B)	Ratio of other costs to total costs	.1512	
V.	Profits alleged by respondent in amended answer to be attributable to furnacing, condensing, cleaning, flasking and transportation of quicksilver (15.12% of $19,423.27)		2,936.80
VI. (A)	Gross income from property (before depletion), item I less items II (B) and V		225,091.53
(B)	Net income from property, item III less item V		16,486.47
VII. (A)	15% of gross income from property, item VI (A)		33,763.73
(B)	50% of net income from property, item VI (B)		8,243.23
VIII.	Depletion alleged by respondent in amended answer to be allowable		$ 8,243.23

Exhibit D—(Continued)

FISCAL YEAR ENDED JUNE 30, 1940

(Respondent's amended computations, excluding dump ores)

I.	Gross sales (Exhibit A)			$517,113.14
II. (A)	Total costs prior to furnacing, items 1 to 4, inclusive, of Exhibit A		$291,414.25	
(B)	Total other costs, items 5 to 7, inclusive, of Exhibit A		64,720.24	
	Total costs of extraction and sale of quicksilver			356,134.49
III.	Operating profit			$160,978.65
IV. (A)	Ratio of costs prior to furnacing to total costs	.8183		
(B)	Ratio of other costs to total costs	.1817		
V.	Profits alleged by respondent in amended answer to be attributable to furnacing, condensing, cleaning, flasking and transportation of quicksilver (18.17% of $160,978.65)			29,250.55
VI. (A)	Gross income from property (before depletion), item I less items II (B) and V			423,142.35
(B)	Net income from property, item III less item V			131,728.10
VII. (A)	15% of gross income from property, item VI (A)			63,471.35
(B)	50% of net income from property, item VI (B)			65,864.05
VIII.	Depletion alleged by respondent in amended answer to be allowable			$ 63,471.35

Exhibit D—(Continued)

FISCAL YEAR ENDED JUNE 30, 1941

(Respondent's amended computations, including dump ores)

I.	Gross sales (Exhibit A)		$791,227.75
II. (A)	Total costs prior to furnacing, items 1 to 4, inclusive, of Exhibit A	$472,878.07	
(B)	Total other costs, items 5 to 9, inclusive, of Exhibit A	116,353.92	
	Total costs of extraction and sale of quicksilver		589,231.99
III.	Operating profit		$201,995.76
IV. (A)	Ratio of costs prior to furnacing to total costs	.8021	
(B)	Ratio of other costs to total costs	.1979	
V.	Profits alleged by respondent in amended answer to be attributable to furnacing, condensing, cleaning, flasking and transportation of quicksilver (19.79% of $201,995.76)		39,974.96
VI. (A)	Gross income from property (before depletion), item I less items II (B) and V		634,898.87
(B)	Net income from property, item III less item V		162,020.80
VII. (A)	15% of gross income from property, item VI (A)		95,234.83
(B)	50% of net income from property, item VI (B)		81,010.40
VIII.	Depletion alleged by respondent in amended answer to be allowable		$ 81,010.40

[Endorsed]: T.C.U.S. Filed Feb. 4, 1943. [44]

The Tax Court of the United States

Docket No. 112,387

KLAU MINE, INC., a corporation,
Petitioner.

vs.

COMMISSIONER OF INTERNAL REVENUE
Respondent.

STIPULATION OF FACTS

It Is Hereby Stipulated by and between the parties hereto that the following facts shall be taken to be true in the above entitled proceeding, and received as evidence therein: [44-a]

* * * * * * *

(10) In the Petitioner's income and declared-value excess profits tax returns for the calendar year ending December 31, 1940, Petitioner elected to claim percentage depletion and claimed and computed deductions for said depletion in said return [44-b] as follows:

Gross income from property	$171,383.43
15% of gross income	25,707.51
Net income	75,894.23
50% of net income	37,947.11

Petitioner's claimed deduction of $25,707.51 for percentage depletion was based on the assumption that the gross income from the property was measured by the gross proceeds from sale of quicksilver in flasks, as stated in Paragraph 4 hereof.

(11) In arriving at the deficiency involved in this

proceeding, Respondent disallowed depletion as computed by the Petitioner to the extent of $8,595.51. Respondent allowed depletion for said calendar year ending December 31, 1940, in the amount of $17,-112.00. Said amount of depletion was computed by Respondent as shown on Exhibit "B" hereto attached.

* * * * * * *

[Endorsed]: T. C. U. S. Filed Feb. 4, 1943. [44-c]

The Tax Court of the United States

Docket No. 112,388

OAT HILL MINE INC., a dissolved corporation,
Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

STIPULATION OF FACTS

It Is Hereby Stipulated by and between the parties hereto that the following facts shall be taken to be true in the above entitled proceeding, and received as evidence therein:

* * * * * * *

(10) In the Petitioner's income and declared-value excess profits tax returns for the calendar year ending December 31, 1940, Petitioner elected to claim percentage depletion and claimed and computed de-

ductions for said depletion in said returns as follows:

Gross income from property	$145,997.92
15% of gross income	21,899.68
Net income	36,007.16
50% of net income	18,003.58

Petitioner's claimed deduction of $18,003.58 for percentage depletion was based on the assumption that the gross income from the property was measured by the gross proceeds from sale of quicksilver in flasks, as stated in Paragraph 4 hereof; and included in the deductions from gross income in order to arrive at net income the sum of $3,750 referred to in Paragraph 11 of this stipulation.

(11) In computing its net income for taxation purposes for the calendar year ending December 31, 1940, Petitioner deducted from its gross income the sum of $3,750, representing a payment made to the Pacific Gas and Electric Company, as a payment under a contract for line extension and transformer [44-e] installation for the supply of electric service at Petitioner's Oat Hill Mine. Said payment was made under the terms of a contract in writing between Petitioner and Pacific Gas and Electric Company copy of which is marked Exhibit "B" and attached to this stipulation.

(12) In arriving at the deficiency involved in this proceeding, Respondent disallowed said item paid to the Pacific Gas and Electric Company of $3,750.00, and disallowed depletion as computed by the Petitioner to the extent of $5,550.20. Respondent allowed depletion for said calendar year ending December

31, 1940, in the amount of $12,453.38. Said amount of depletion was computed by Respondent, as shown on Exhibit "C" hereto attached.

If Respondent did not err in disallowing said amount of $3,750, then Respondent concedes that petitioner is entitled to an allowance for percentage depletion of $1,711.57 in addition to the amount allowed in the deficiency notice. Said additional allowance is computed as set forth in Exhibit "D" attached hereto. [44-f]

* * * * * * * *

EXHIBIT "B"

Agreement for Line Extension and/or Transformer Installation to Supply Service to an Installation of Questionable Permanency

Pacific Gas and Electric Company

This Agreement made by and between OAT HILL MINE, INC. hereinafter called Applicant, and PACIFIC GAS AND ELECTRIC COMPANY, a California corporation, hereinafter called Company,

Witnesseth that, in consideration of the mutual promises of the parties hereto herein contained, it is hereby agreed that the Company will furnish all labor appliances and material required for the installation of, and will install for the Applicant, the hereinafter described equipment in order to furnish electric service to Applicant, for use upon property in the County of Napa, State of California, situate at————, for the price and upon the terms and conditions herein set forth, and in accordance with the drawing

hereto annexed which is hereby made a part hereof.

Said equipment shall be as follows:

Approximately 14,310 feet of three phase, 6900 volt, electric line installed on wood poles, together with the necessary appliances; 3-25 KVA & 3-15 KVA transformers, necessary metering equipment.

Said equipment when installed shall at all times remain the property of the Company and the Company shall be entitled to remove the same upon termination of said service.

Whenever part or all of said equipment is to be installed upon property other than that of the Applicant, the Applicant shall first procure from the owners thereof, in the name of Company, all rights of way necessary for the construction, maintenance and operation of said equipment upon such other property, which rights of way shall be satisfactory to the Company and without cost to it.

The Applicant shall pay to the Company immediately upon the execution of this contract as the complete contract price for said work to be performed hereunder, and the Company shall accept, the sum of Three Thousand Seven Hundred Fifty & No/100 Dollars (3750.00—).

If and whenever Applicant shall have operated the electrical apparatus originally installed by him or its equivalent, served from the equipment installed hereunder, for a period of thirty-six (36) consecutive months, and the Applicant's business shall at that time have proved its permanency to the entire satisfaction of the Company, and upon the execution of the proper agreements and the compliance by Ap-

plicant with all the conditions necessary to [44-g] obtain permanent service pursuant to the Company's standard practice relative to the construction of electric line extensions in force at the end of said thirty-six months period, the Company shall repay to Applicant said contract price except such portion thereof as may be required as a line extension deposit under the Company's standard practice relative thereto, and said deposit shall thereafter be refunded in accordance therewith.

In Witness Whereof the parties hereto have executed these presents this——day of————, 1940.

OAT HILL MINE, INC.
H. W. GOULD, Pres.
PACIFIC GAS AND ELECTRIC COMPANY,
By Clifford Bartlett
By B. C. Wise
Manager of its North Bay Division.

REC'D PAYMENT
6739 Dec 9 1940
CALISTOGA
Pd. 3750.00
12-9-40
H.W.G.

[Endorsed]: T. C. U. S. Filed Feb. 4, 1943. [44-h]

United States Board of Tax Appeals

Docket No. 112,389

WILD HORSE QUICKSILVER MINING COMPANY, a dissolved corporation,

Petitioner.

vs.

COMMISSIONER OF INTERNAL REVENUE

Respondent.

STIPULATION OF FACTS

It Is Hereby Stipulated by and between the parties hereto that the following facts shall be taken to be true in the above entitled proceeding, and received as evidence therein: [44-i]

* * * * * * *

(10) In the Petitioner's income and declared-value excess profits tax returns for the fiscal year ending September 30, 1940, Petitioner elected to claim percentage depletion and claimed and computed deductions for said depletion in said return as follows:

Gross income from property	$116,321.32
15% of gross income	17,448.20
Net income	56,856.22
50% of net income	28,428.11

Petitioner's claimed deduction of $17,448.20 for percentage depletion was based on the assumption that the gross income from the property was measured by the gross proceeds from sale of quicksilver in flasks, as stated in Paragraph 4 hereof.

(11) In arriving at the deficiency involved in this proceeding, Respondent disallowed depletion as computed by the Petitioner to the extent of $7,076.99. Respondent allowed depletion for said fiscal year ending September 30, 1940, in the amount of $10,-371.21. Said amount of depletion was [44-j] computed by Respondent as shown on Exhibit "B" hereto attached.

* * * * * * *

[Endorsed]. T. C. U. S. Filed Feb. 4, 1943 [44-k]

EXCERPTS FROM TRANSCRIPT OF TESTIMONY (SAN FRANCISCO, CALIF. 2-4-1943) RE ORAL MOTION FOR CONSOLIDATION.

Mr. Searls: As these cases all involve one point in common, it is my suggestion, and I tender a stipulation, that the record made in the New Idria case, with respect to the testimony, may be considered as a part of the record in each of the other three cases, and that separate stipulations as to facts will be filed in each case to be a part of the record of the case in which the stipulation pertains.

Is that satisfactory?

Mr. Horrow: That is agreeable, your Honor.

I might suggest that the cases be consolidated for briefing because I think the principal issue of law is involved in each case. [44-l]

In the United States Circuit Court of Appeals for the Ninth Circuit

BTA-Docket No. 112386

NEW IDRIA QUICKSILVER MINING COMPANY, a corporation,
Petitioner on Review.

v.

COMMISSIONER OF INTERNAL REVENUE,
Respondent on Review.

STATEMENT OF EVIDENCE

Following is a statement of evidence in narrative form in the above-entitled cause.

This case was called for hearing before the Honorable Charles P. Smith, Judge of The Tax Court of the United States on the 4th day of February, 1943, together with the cases of Klau Mine, Inc., BTA-Docket No. 112387; Oat Hill Mine, Inc., BTA-Docket No. 112388, and Wild Horse Quicksilver Mining Company, BTA-Docket No. 112389. Robert M. Searls, Esq., appeared as counsel for the petitioner, and Harry R. Horrow, Esq., Special Attorney, Bureau of Internal Revenue, appeared as counsel for respondent. Thereupon, the following proceedings took place:

Thereupon it was agreed by counsel that, since the above-mentioned cases involved on common issue, the record made in the New Idria Quicksilver Mining Company case, with respect to the testimony of wit-

nesses, may be considered as a part of the record in each of the other three cases, and that separate stipulations as to facts be filed in each case to be a part of the record of the case in which the stipulation pertained.

Thereupon, there was introduced and made a part of the record the stipulations of facts in the respective causes, copies of which are made a part of the respective records on review in the several cases.

[45]

Thereupon, counsel for petitioner, after making an opening statement as to the issues and anticipated proof, called the following witnesses who testified in the case:

WALTER W. BRADLEY,

being called and duly sworn, testified on Direct Examination as follows:

I am a mining engineer, and hold the official title of State Mineralogist of the State of California. I am a graduate of the University of California, College of Mining, and have practiced my profession for 42 years. As a part of the duties of my office, I maintain an information bureau of all of the mineral resources of the State of California of whatever kind and character, the location, type, production, extent of development, and various other pertinent facts, including a geological survey. I have had occasion in connection with my work to visit and examine mines throughout the State. I am familiar with the quicksilver mines of this State and have visited at

(Testimony of Walter W. Bradley.)

least 90 per cent of them. I am familiar with the metallurgy of quicksilver ores and form in which the product of quicksilver mines is marketed. The first marketable product from a quicksilver mine is quicksilver metal, or the element mercury. In my experience and particularly within the last ten years, I do not know of any successful concentration of quicksilver ores in this State. It has been tried in a number of places but given up as uneconomical; it would not pay; it is not commercial; the ores are low grade. Quicksilver ore as it comes from the mine itself is not marketable. There is nobody to handle it and nobody would take it. There are no custom mills for quicksilver. The percentage of metal in the ore has gradually dropped until today I think there are some mines working ores that do not carry [46] more than four or five pounds of quicksilver to the ton. In the period of 1915 to 1918 when I conducted a series of experiments and research work on ore dressing of quicksilver ores, the average at that time was, with the larger producers, probably around eight or probably as much as ten pounds of quicksilver per ton. At the time that I conducted a part of the experimental work for the State Mining Bureau I did some work on concentration. I found that physically and technically it was possible to concentrate cinnabar, but it was a question in the ultimate analysis of cost. Compared then with the furnace which had been used for many years as the, what shall I say, the most important producer of quicksilver, the Scott Furnace,

(Testimony of Walter W. Bradley.)

the costs by concentration would have been more than treatment in the Scott Furnace. Just at about the close of my experimental work the rotary furnace was adapted to the roasting of quicksilver ore at the New Idria Mine which, in turn, reduced costs very much below those of the Scott Furnace, and for that reason concentration has never been commercial because it was much cheaper to put the ore through the furnace; so that the first and only marketable product of the operation of the quicksilver mine is the metal itself.

Today you can find in some small veins, where maybe one or two men are working on a small scale and they can hand pick their stuff, they may get ore that will run 20 or 30 per cent of mercury; but those are few and far between. The commercial production of quicksilver today, both in California and other Western States, is on the lower grade ores handled through furnacing larger tonnages. The larger commercial operations have a range below ten pounds of [47] mercury per ton. This means that if you were to attempt to sell the ore you would have to transport 1990 pounds of waste rock in order to transport 10 pounds of mercury. That is not economically possible. There are no custom mills or central mills where such ores could be treated with which I am familiar; and in my position, if there were any such, I would be likely to know.

Cross Examination

It is physically and technically, though not commercially possible, to concentrate quicksilver ores

(Testimony of Walter W. Bradley.)

by standard methods of concentrating other metallic products. In other words, you can use the gravity method, like table zone concentrators; you can use a flotation method; and it can be done by a certain chemical solution method. Nobody uses them because it is not commercial to do so. If you were to concentrate cinnabar by gravity, you would first have to, as in the case of copper ore, grind it up fine, put it over tables which would seperate the higher specific gravity elements from the lower specific gravity elements. The result would be a concentrate of the mineral cinnabar. When you get the cinnabar, you still haven't your quicksilver. That process is comparable from the physical standpoint to the concentration by gravity of gold or silver ores. Physically and technically, the process is the same. In concentrating cinnabar by flotation, you must fine grind it, mix the crushed ore with certain chemical elements or oils and agitate it. The cinnabar rises with the froth and then is collected. This froth contains the mercury. The waste materials drop to the bottom and are discarded. The process technically and physically is the same as concentration by flotation of gold and silver ores. The process [48] depends upon the difference in specific gravity and physical properties between the metallic minerals and the non-metallic gangue. So that cinnabar may be concentrated technically in the same manner as copper, gold or silver. The product obtained through concentration does not change the chemical composition of cinnabar. The concentrated

(Testimony of Walter W. Bradley.)

product is in the same natural state in which it existed when the ores were in place in the mine. This is also true of gold, silver or copper concentrates. The chemical composition and the state of the metal in the concentrated product is the same as it was when it was in the ore-bearing rock in place in the mine. When cinnabar is furnaced, that is put through the furnacing process, its chemical composition changes. It is a process of distillation. The chemical composition is changed by the separation of the mercury from the sulphur in the compound. The product obtained by furnacing and condensing is practically pure mercury or quicksilver, that is, after it is cleaned. I would not be able to say offhand what the exact percentage of purity is prior to cleaning because I don't think anyone analyzes it at that stage. To my knowledge, it is practically pure mercury. The further separation of any impurities that may be with it is purely a chemical process. The process of condensation is purely mechanical process by flotion or gravity. In some instances, it may involve the application of heat, but not usually. Customarily, concentration does not involve the application of heat, speaking of the cases of copper, gold or silver; no heat is applied in the process of gravity or flotation concentration. The process of obtaining mercury through furnacing and condensing is in part a mechanical process. That is, the ore is roasted, the [49] rock is raised to a certain temperature and the rock is itself changed. It is in part oxidized, but the rock is not smelted. It comes through in practically

(Testimony of Walter W. Bradley.)

the same form it was in to begin with; merely the element mercury is distilled over from the furnace to the condensers. It takes mechanical appliances to conduct the furnace operation. Mechanics are involved. You cannot do it without it. You cannot apply heat to a pile of ore on the ground and get quicksilver out of it; you have to put it through certain mechanical appliances. These mechanical processes consist solely of bringing the ore to and carrying it through the heating device, whether you use the old style Scott or the present rotary furnace. The separation of the mercury from the cinnabar is brought about through the application of heat.

The attempted concentration of mercury ore to which I referred involved both mechanical concentration and flotation. It was tried at the New Idria Mine and the Cat Hill Mine, and more recently, three or four years ago, at the Cloverdale Mine in Sonoma County, and in every case it was discontinued because it was not commercial; it was uneconomic. When I say it is uneconomic, I mean that the furnacing process costs so little that there is no justification for this intermediate process. In other words, if it cost you, for example, $100 to produce a flask of quicksilver by the furnace method, and it cost you $150 to produce it by this other method, using concentration, why are you going to spend $150 to produce your quicksilver when you can do it otherwise for $100? By that I mean no prudent business man, or a man in his right senses, would use the concentration method as compared

(Testimony of Walter W. Bradley.)

with furnacing. Over a period of time efforts have been made, other than [50] furnacing, to develop methods of concentrating cinnabar which will be commercially acceptable. I do not know of any attempts being made at the present time to commercially concentrate quicksilver ore. They have been definitely and permanently abandoned. The later efforts that I spoke of were made by people who were ignorant of what had gone on before and simply wasted their money trying something that somebody else had already proven impractical. There is no telling who may take a chance again. I might say, if you don't mind me interposing something by way of background, that when I undertook that experimental work for the State Mining Bureau in 1915 I, myself, had had some years' experience in gold mining. I had visited in the course of my duties for the State Mining Bureau, a number of quicksilver mines, and the thought came to me, in the light of my gold mining experience, why hasn't somebody tried concentration on quicksilver ores. Here is a case of heating 1990 pounds of rock to get out 10 pounds of quicksilver. After three years of experimental work, I concluded that the old timers knew what they were up to and they were working on an economic system; the most economic system. Doubts are very much against the concentration method being adopted in the light of experience. It would be uneconomic to transport crude cinnabar for purposes of extracting the quicksilver through furnacing if you have any regard for com-

(Testimony of Walter W. Bradley.)

mercial profit, and that is what most of us are working for. In other words, it is not economical to separate the function of mining cinnabar from the function of extracting the quicksilver from the ore by furnacing and condensing. Physically, the individual who mines the cinnabar could, of course, turn the crude product over to someone else who might have a furnace right on the premises, or [51] adjacent to the premises, but these things are not done simply because of economic circumstances. I do not know of any case where a lessee is permitted to mine cinnabar where the lessor would extract quicksilver from the mined cinnabar. You would simply be adding elements to your cost. You would be bound to have more overhead costs. A Scott furnace is a vertical type furnace built of brick with interior shelves, and the ore went down and cascaded down below. That type of furnace which was used for quicksilver reduction from 1875 to 1917 is not in use any more. It has been superseded by the rotary furnace. Quicksilver has also been separated from its ores by retorts. These are devices of small capacity and are only suitable for handling selected high grade ores because of the high labor costs and low tonnage capacity involved. There are two types of retorts, one known as the "D" retort with cross sections shaped like the letter "D", and the other known as pipe retorts, which may be pipes similar to a cast iron water pipe, we will say, of varying diameters, depending on what capacity you want to have. They may be 6, 8, 10 or 12 inches in diameter.

(Testimony of Walter W. Bradley.)

They are not very expensive,—might cost from $2,000.00 to $5,000.00, depending on the size. The average size of pipe is probably 10 to 12 inches. They are arranged in banks of 2, 3, up to as high as 12 pipes. A few retorts are being used in California today for small operations. They are not portable in the sense that you take them down and re-erect them somewhere else. The pipes are generally set in place in masonry and as one pipe burns out you put another in its place. [52]

Redirect Examination

In the days when we tried to concentrate quicksilver, even after getting the concentrate, it had to be retorted,—it was not a marketable product. Even at that time there were no commercial mills that handled concentrates. You would not have a marketable product when you got your concentrate. I am familiar with the handling of gold ores in stamp mills where the ore is crushed, run out onto plates and caught by quicksilver and then scraped up in the form of amalgam. The amalgam is heated in retorts and the quicksilver is distilled off from the gold, leaving the gold behind. In the case of a quicksilver furnace you distill the quicksilver off and leave the rock behind. There is no difference in principle; it is a mechanical process; no chemicals are injected into the quicksilver furnace. There is no smelting of ore as there is in a smelter, or injection of other elements to produce alloys, or anything of that sort.

(Testimony of Walter W. Bradley.)

Recross Examination

In amalgamating gold, quicksilver has an affinity for gold and silver, and it is a case of whether the quicksilver is absorbed by the gold or the gold is absorbed by the quicksilver. The two reach a state of intimate mixture which is known as amalgamation. There is a natural occurring mineral which is known as electrum; that is a combination of gold and mercury. You get in amalgam artificially a similar material. Prior to the amalgamation the gold exists in its native form, in the same form in which it existed prior to the removal of the ore from the mine, and prior to crushing. It is united in the process of amalgamation with mercury in its native state. Generally [53] speaking, nothing is done to cinnabar prior to the vaporizing of mercury in the way of adding lime or other substances, but sometimes where you have a high content of certain other sulphides, lime is added to take up the extra sulphur. That is to prevent the excess sulphur driven off from those sulphides from recombining with the mercury and preventing it coming out in a metallic form. In the case of cinnabar, the crushed ore is put through the furnace. In the case of amalgamated gold, the mercury which is vaporized has previously been added artificially.

WORTHEN BRADLEY,

being called and duly sworn testified on Direct Examination as follows:

I reside in San Francisco and I am President of the Bradley Mining Company. My professional status is that of mining engineer although I did not graduate from college as a mining engineer but became one by experience rather than by a college degree. I was practically raised in the mines, being in contact with them, visiting them and working in mines since my school days and during school vacations. I have had experience in quicksilver mines. The Bradley Mining Company, of which I am president, owns seven quicksilver properties, four in California and three outside of the State. The California mines are the Sulphur Bank, The Reed, Great Western and Mt. Diablo; and there is the Gold Bank Mine in Nevada, and the Bretz and Opalite Mines in Oregon. I have been in charge of operations since 1927. I am familiar with the details of quicksilver mining methods and methods of obtaining metal from the ores. In my opinion, the first marketable product which can be obtained from a quicksilver mine is the metal quicksilver in an iron bottle. It is liquid in its native state and has to be put into a [54] container. There is no intermediate product between the ore in place in the ground and the metallic quicksilver in the flask which can be sold in the market of which I have any knowledge. I do not know of any successful concentration of quick-

(Testimony of Worthen Bradley.)

silver ores as an economic proposition by gravity or flotation.

"Q. Do you consider then that the vaporizing itself is a method of concentration?

Mr. Horrow: I object to that, your Honor. I think it is objectionable.

Mr. Searls: I think the witness is qualified to answer.

Judge Smith: The objection is overruled.

What is the ground for your objection, Mr. Horrow?

Mr. Horrow: Simply this: I think that the statute, or rather, the regulations referred to concentration by gravity or flotation. I think the witness can describe the facts relating to vaporizing of mercury, and just what physical changes take place, what product results, but to characterize that process as concentration, such as concentration by flotation or otherwise, I don't think it is a matter for testimony. It is a pure question of law whether that is concentration within the meaning of the regulation.

Judge Smith: The objection is overruled."

Yes I consider that vaporizing itself is a method of concentrating. You get a concentrated product from the rock, the vapor and the soot,—the soot itself has to be concentrated to remove the last impurities and get the final product, which is the metal, quicksilver. No chemical element is injected into this vaporizing; just heat, and the furnace rotates and the [55] ore gradually rolls from the

(Testimony of Worthen Bradley.)

upper end down to the lower. You have the two elements of motion and heat, the motion is purely mechanical. In so far as I know, the concentrates of quicksilver metal have never been marketed as concentrates. The only instance I know of is that there is some antimony concentrates coming in from Mexico which have mercury in them as a by-product. There is no domestic United States ore that is marketable in the form of concentrates that I know of. Even where it is physically possible to concentrate it, the concentrates had to be roasted before a marketable product was obtained.

Cross Examination

The reference to vaporizing as a form of "concentration,"—I used the word in the sense of obtaining a small product from a big one. I would characterize the refining of gold as a concentration in the same sense. In other words, I would characterize as concentration any process whereby the weight of the product derived from the treating of metallic ores was lessened. The furnacing of cinnabar involves heat and motion. Cinnabar cannot be furnaced without movement of the cinnabar, if furnaced means a large mechanical affair and not just a small oven-like affair which would characterize it a retort. It may not be roasted on a large scale so as to obtain mercury without keeping the cinnabar in motion. On a small scale it could be roasted without being in motion. It may be roasted in a retort and mercury obtained therefrom without moving the ore on a small scale. The motion I

(Testimony of Worthen Bradley.)

refer to is not simply that of bringing the ores through the furnace and out of the furnace. It is different in this respect: You are moving a large mass of material; you are retorting a large mass of material, [56] which has to be turned over and over to liberate the gases which are present. You have the product of combustion and gases from the ore all present in the same chamber, and they have to be drawn off. In the case of a retort, you have only the gases from the ore drawn off. That is getting technical, but there is a fine point there. You have a much larger gas volume drawn off from a moving mass in a rotating furnace than you do from a small mass in a retort. The motion of the ore certainly has something to do with releasing the mercury from the cinnabar; it does not take place only through the application of heat. You can put some very high-grade ore in a retort which is motionless. If the cinnabar—the richest part—is in the center of the rock and barren rock is on the outside. Sometimes it will not be burned through because there is no motion. In a furnace which turns it over and over, and you also have the chance of breaking it up in the furnace, you can get all faces of the rock exposed to the heat. The motion is a matter of exposing the cinnabar to the heat, but it is an aider and abetter of the breaking up of the chemical components. It is an aid in bringing about the application of the heat and the breakdown in the chemical composition results in the application of the heat.

(Testimony of Worthen Bradley.)

Redirect Examination

When you concentrate any ore by flotation, the agitation which takes place ahead of flotation cells makes it possible for the water to wash away the waste and leave the concentrates. That is usually done to create a uniform mixture for the flotation cells, rather than to wash anything away. You may get a lot of residue that you do not treat further. [57]

Recross Examination

No chemical change takes place in concentration by gravity or flotation of gold or silver ores.

HENRY W. GOULD,

being called as a witness on behalf of the petitioner, having been first duly sworn, testified on Direct Examination as follows:

I am vice president and general manager of the New Idria Quicksilver Mining Company, petitioner herein; also president of the Oat Hill Mining Company, the Wild Horse Quicksilver Mining Company, and was at one time president of the Klau Mines, Inc. I am a mining engineer and operator—not a college graduate. I did not attend the university. I obtained my experience by starting in the mines about 1902; it has been largely with quicksilver mines. We developed the rotary furnace referred to here and hold some patents on it. One of these furnaces is known as the Gould furnace. I am

(Testimony of Henry W. Gould.)

familiar with most of the quicksilver mines in this country. I obtained my familiarity by visiting these mines over a period of many years, both with the idea of examining the mines and also with the idea of selling furnaces. I am familiar with the process of obtaining quicksilver from the ore in practically all of these mines. 98% of the quicksilver ore of the United States is cinnabar, which is a sulphide of mercury. The grade of the ore varies greatly even in the same mine. For instance, at New Idria, it ranges from 2 pounds up to 40 pounds or more per ton. The average in this country, I think, is around 5 or 6 pounds. I may be mistaken on that, but not far from that point. At New Idria, for the past year, our recovery was 4.83 per ton. I guess it is the largest producer in the [58] country and it has been for many years. Last year, we produced about 8,000 flasks; 7,984 to be exact. The first marketable product we get from the mine is what we can sell in the flasks, as such. We sell them either in San Francisco or New York. That is the custom so far. All of our quicksilver has been sold either in San Francisco or New York for the past five years. Cinnabar ore has never been marketed in the United States in its crude state. I do not know of any quicksilver product that is sold in this country except the quicksilver itself as mined and furnaced on the job at the plant. I don't know as to the possibility of concentrating quicksilver economically, but I think I have done more work along that line than anyone in the country. We tried for

(Testimony of Henry W. Gould.)

dumps as distinguished from the burned ore dumps.

Mr. Horrow: With that understanding I have no objection.

Q. (By Mr. Searls) I ask you now whether the ore which you took out of these mine dumps is the same character rock that you find underground in your mind? A. Exactly the same; yes.

Q. Cinnabar? A. Yes.

Q. And it simply has not been treated other than to be taken out of the ground? A. No.

Q. Now, with respect to the burned ore dumps, what is the character of the ore of those dumps that you take?

A. Those dumps were old furnace dumps put there prior to 1902. I was not there in 1902, but I was there in 1908. I know that in 1901 the furnaces were not built, but they were built in 1902. The old furnace [61] dumps prior to 1900 were covered up by the Scott furnaces that were built in 1901 and 1902. These dumps were mine ore dumps with adobe in them, and this was a coarse ore furnace. We could tell those old dumps by the amount of adobe that was in them and the fact that it was all coarse ore. We had to take the top off of that, of that coarse ore furnace dump, about 20 feet of overburden which the Scott dumps placed there after that time. But the ore was the same as any ore except that it carried more quicksilver per ton. With the Scott ore furnace it wouldn't pay to run it and we had to waste that.

(Testimony of Henry W. Gould.)

Q. Why was this ore wasted—how did it come to be left there?

A. Because they had very poor furnaces in those days. The furnaces of that time were rather a crude affair as compared to the Scott furnaces, which was a big improvement, and later the rotary furnace, which completely eliminated the possibility of getting anything in the tailings in the future.

Q. In other words, at the time those dump ores were placed there the furnace simply removed part of the quicksilver and left the rest in the ore?

A. Exactly.

Q. And you have found it possible, with your improved furnace, to remove the balance of that quicksilver?

A. That and the improved price of quicksilver helped too.

Q. Now, with respect to the Oat Hill case—this testimony applies only to that case—Mr. Gould, do you remember the time you started the Oat Hill operation and making arrangements with the Pacific Gas and Electric [62] Company for the supplying of electric power to that mine?

A. Yes.

Q. And making a deposit for that purpose?

A. Yes, sir.

Q. At the time you did that, what was your opinion as to the length of the operation which you might reasonably expect for mining the Oat Hill ore?

Mr. Horrow: Will you read the question, please?

Mr. Searls: Well, just strike it out.

(Testimony of Henry W. Gould.)

By Mr. Searls:

Q. Looking at the situation as it appeared at the time you made this deposit with the Pacific Gas and Electric Company, what would you say was the then apparent life of the operation?

A. As long as the war, which might have been three years, possibly less at that time.

Cross Examination

Cinnabar has a characteristic vermillion color, sort of a reddish color. The ore containing cinnabar can be differentiated from waste ore which does not contain cinnabar, if it is rich enough. After the furnacing operation, the quantity of mercury and soot collected in the buckets is very much less than the quantity of ore run through the furnace. It may be 1%, or something like that. Last year, we received about 4.83 pounds of clean mercury per ton and about 50 pounds of soot and other residue were collected with the mercury in the buckets; we got approximately [63] 19 or 20 pounds collected in the buckets after furnacing and condensing out each ton of crude ore placed in the furnace.

"Q. You were comparing the furnacing operation with the stamp mill operation. Can you state the quantity of concentrated ore that is obtained in comparison with the amount of crude ore material that is run through the mill?

A. It would depend—if you are stamp milling —I ran a stamp mill for several years. We handled 400 tons a day; of that, we got about 30 tons of concentrates, besides the amalgam we took out. The

(Testimony of Henry W. Gould.)

amalgam was not much, but we got about 30 tons of concentrates per day."

Of the ore that goes through the stamp mill, we saved about one-half of our gold by the stamp mill; the balance by concentration. The stuff that went through the stamp mill was a very small proportion. Most of it was received in the concentrates. The degree of refinement of gold in the concentrated ore depends upon the mine. It is in its natural state but not all straight gold. The mercury obtained from furnacing is all pure mercury. Mercury is not found in a pure state in cinnabar. Sometimes pure mercury can be found in its natural state, but that is not true with respect to any of the mines involved in these cases. Here, all of the mercury is obtained from cinnabar. I know of many instances where crude ores containing cinnabar in place in its natural state are removed by power shovels. This is being done at New Idria, at the Sulphur Bank in Lake County and at several mines. Cinnabar in place is not necessarily, generally or customarily removed by power shovel, but it may be if close [64] enough to the surface. Customarily the ore is removed by underground operations but they may be taking a lot of stuff from the surface. I couldn't tell you what percentage of crude ore mined at New Idria was removed by shovel. Last year we removed a lot of ore from the surface; more from the surface than we did from underground. I am referring to ore that was in place. Some of it was in place and some was

(Testimony of Henry W. Gould.)

not. It is mighty hard to differentiate what is in place and what isn't. I mean, we have a mountain and a talus coming down from this mountain. The surface of that does not carry values, but as soon as you get underground, before you get to the solid rock, you find an old talus that has been coming down that mountain side for a long time. We mine that the same as we do ore underground,— I mean ore in the mountain. At New Idria that ore stood up there some 250 feet above the bottom of the mine at the time we started mining it. We were mining on that surface ever since until the last few years. We are mining it now. When we removed the cinnabar by power shovel it was underneath the surface. We removed the cinnabar by power shovel. When we came to the hardwall we went on in if there was anything to go for. Some of the cinnabar was taken out of the rock by power shovel.

We did not concentrate dump ores at New Idria during the period in litigation. Before we got the furnaces all in operation we concentrated a little. We had a small operation there with a jig. We made a very poor reovery, about 60%, which we immediately stopped as soon as we got the additional furnaces in operation. We did not use concentration on dump ores because we did not have enough yield from them. When we got our furnaces in then we went back to furnacing. [65]

"Q. So that if the price of quicksilver becomes high enough, and if your crude ores are sufficiently low in grade, concentration is advisable?

(Testimony of Henry W. Gould.)

A. No, I don't think so. It is something we can boost production on at the moment and take advantage of the high price. We don't know how long it would last. There was no great amount of it run and it was not very successful."

Upon completion of the foregoing testimony, the cause was argued and submitted upon briefs, and thereafter briefs were duly filed by petitioner and respondent with the Court.

The foregoing evidence, including the respective stipulations of facts, is all of the material evidence adduced at the hearing before the Tax Court, and this statement is hereby approved by the undersigned counsel for the parties as a correct statement of the evidence in narrative form.

ROBERT M. SEARLS
Attorney for Petitioner on Review.

(Signed) J. P. WENCHEL
SLY
Chief Counsel,
Bureau of Internal Revenue,
Attorney for Respondent on Review.

CRM/cal
9/25/43

[Endorsed]: T.C.U.S. Filed Oct. 12, 1943. [66]

2 T. C. No. 50

The Tax Court of the United States

Dockets Nos. 112386-112389, incl.

NEW IDRIA QUICKSILVER MINING COMPANY,

Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

KLAU MINE, INC.,

Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

OAT HILL MINE, INC.,

Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

WILD HORSE QUICKSILVER MINING COMPANY,

Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

FINDINGS OF FACT AND OPINION

Promulgated July 14, 1943

1. The basis for computing percentage depletion on quicksilver mines for 1939, 1940, and 1941 held to be the market value of the cinnabar ore, from which the quicksilver was extracted, at the mouth of the mines and not the market value of the quicksilver in flasks, as reflected in gross sales thereof.

2. Percentage depletion deductions held not allowable on income derived from processing "dump" ores which were deposited on taxpayer's premises by prior owners and operators of the mine. Carl M. Britt, 43 B.T.A. 254, and Consolidated Chollar Gould & Savage Mining Co., 46 B.T.A. 241, followed; Kennedy Mining and Milling Co., 43 B.T.A. 617, distinguished.

3. Amount paid to a utility company to cover the cost of extending a power line to taxpayer's mine under a contract which provided for return of the amounts to the taxpayer at the end of a three year period, upon certain stipulated conditions, held not

deductible in whole or in the year of payment as a business expense and not subject to an allowance for exhaustion or depreciation, in the absence of a proper basis for computing such an allowance.

Robert M. Searls, Esq.,
for the petitioners.

Harry R. Horrow, Esq.,
for the respondent.

[Seal]

[67]

These proceedings, consolidated for hearing, involve deficiencies in income taxes and declared value excess profits taxes as follows:

New Idria Quicksilver Mining Co., Inc., Docket No. 112386.

Year Ended	Income Tax
June 30, 1939	$ 188.34
June 30, 1940	3,414.32
June 30, 1941	6,540.50

Klau Mine, Inc., Docket No. 112387

Year	Income Tax	Declared Value Excess Profits Tax
1940	$3,934.70	$218.53

Oat Hill Mine, Inc., Docket No. 112388

Year	Income Tax
1940	$2,680.63

Wild Horse Quicksilver Mining Co., Docket No. 112389

Year Ended	Income Tax
Sept. 30, 1940	$1,344.63

The issues presented are (1) whether in the case of quicksilver mines percentage depletion is to be

computed on the gross sales of the marketable product, that is, mercury in iron flasks, or on the market value of the cinnabar ore from which it is extracted as it emerges from the mines; (2) whether any depletion deductions are allowable in respect of the mercury produced from "dump" ores deposited on the premises by prior owners; and (3) whether an amount paid by one of the petitioners to an electric company for the extension of a power line to its mine is deductible in the year of payment.

Issue (1) is common to all of the proceedings, while issue (2) is involved only in the case of New Idria Quicksilver Mining Co., Docket No. 112386, and issue (3) only in the case of Oat Hill Mine, Inc., Docket No. 112388. [68]

FINDINGS OF FACT

The New Idria Quicksilver Mining Co. is a Nevada corporation with its principal office at No. 10 Pent House, Mills Building, San Francisco, California.

Klau Mine, Inc., is a California corporation with its principal place of business at 100 Mills Building, San Francisco.

Oat Hill Mine, Inc., was a California corporation with its principal office at 100 Mills Biulding, San Francisco. It was dissolved in December 1941 and its directors became trustees for the creditors and stockholders.

Wild Horse Quicksilver Mining Co. was a Nevada corporation with its principal place of business at

200 Montgomery Street, San Francisco, California. It was dissolved in December, 1941, and its directors became trustees for the creditors and stockholders.

All of the petitioners filed their income and declared value excess profits tax returns with the collector of internal revenue for the first district of California. Their returns were all made on an accrual basis.

During all of the taxable years New Idria Quicksilver Mining Co., referred to hereinafter in our findings of fact as petitioner, owned and operated a quicksilver mine located in San Benito County, California, which it purchased in 1936.

Quicksilver, or mercury, is obtained from ore containing cinnabar, a chemical compound of mercuric sulphide. The cinnabar ore is crushed and roasted in ovens and the mercury is released in the form of a vapor. The vaporized mercury is then condensed and worked with lime to remove soot and other impurities. After this cleaning operation the mercury is placed in metal containers or "flasks" and sold on the market.

Petitioner's principal source of mercury during the taxable years was crude cinnabar ore extracted from subterranean workings in its mine. These workings were developed by "drifts" and "crosscuts." The ores were blasted [69] and sorted in the mine and those containing sufficient cinnabar were hauled in cars to the surface where they were crushed and carried by conveyors to the furnaces.

Petitioner operates two furnaces at its mine. They

are of the rotary type, five feet in diameter and fifty-six feet in length. They are made of iron and lined with fire brick. The crushed ores are fed into the furnaces and heated to a temperature of about 1200° Fahr. The mercury vapors as they are released by the heat are drawn from the furnace by suction fans and passed into a condenser system, which consists of two vertical banks of ten pieces of sixteen inch iron pipe each, with rubber buckets at the bottom of the pipes to collect the condensed mercury. These buckets are emptied on tables where the contents are mixed with slack lime and worked with hoes to cleanse or free the mercury. After this operation the mercury is practically pure and is ready for market.

This method of extracting mercury is similar in many respects to the method used in extracting gold by the "amalgamation" process. By that process concentrated gold ore is treated with mercury, causing a fusion or amalgamation of the gold and mercury, which are said to have a natural affinity for each other, and the mercury is then separated from the gold by distillation.

Experiments have been made from time to time in prior years, by petitioner and others, with different methods, such as the "gravity" and "flotation" methods, for concentrating the cinnabar ore before furnacing and condensing it. These experiments have all proven uneconomical. The cost of concentration alone was found to be approximately as great as or greater than the cost of roasting the crude ore in the rotary furnaces, and the concen-

trated ore still had to be heated in retorts. At the present time the [70] method employed by the petitioner, as described above, is that generally used in the production of mercury, commercially, in the United States.

There are located on petitioner's properties large deposits of ores which in years past have been mined and discarded by former operators. Some of these ores have been furnaced by former operators and some discarded before furnacing because of their low content of cinnabar ore. Mine operations have been carried on on the property continually since about 1858. The discarded and burnt ores, which are referred to in the stipulation as "dump" ores, contain a small amount of cinnabar from which mercury can be profitably recovered under modern improved methods of operation. The petitioner processed considerable quantities of these dump ores during the taxable years, in addition to the crude ore which it extracted from its mine. They were loaded on trucks with steam shovels and hauled to the furnaces where they were processed in the same manner as the crude ore from the mines. The dump ore deposits are located about a mile and a half from petitioner's plant.

Petitioner's gross sales of mercury obtained from the mined ores and from dump ores during each of the taxable years and its net sales, after deductions of all costs of production but without any deduction for depletion, were as follows:

	Mined Ores		Dump Ores	
Year	Gross Sales	Net Sales	Gross Sales	Net Sales
1939	$265,174.54	$ 19,423.27	$ 57,844.18	$ 683.06(Loss)
1940	517,113.14	160,982.65	80,700.36	30,993.42
1941	791,227.75	201,995.76	110,489.70	40,313.66

Crude cinnabar ore was not bought or sold in the vicinity of petitioner's mine during any of the taxable years and there has never been any established market for it. [71]

Petitioner elected to claim depletion deductions in its income and declared value excess profits tax returns for the taxable years 1939, 1940, and 1941 on a percentage basis, computed on its total gross sales of mercury from all sources. The respondent determined in his deficiency notice that petitioner's percentage depletion deductions should be computed on the basis of the selling price, or market value, of the cinnabar ore at the mouth of the mine and not on the selling price of the mercury in flasks. He arrived at that basis by excluding from gross sales, on which the depletion deductions were computed, all of the costs of transporting, furnacing, condensing, cleaning, and flasking, as shown by the petitioner's books. The resulting reduction of the depletion allowances claimed in petitioner's returns for each of the taxable years was as follows:

Year Ended	Claimed in returns	Allowed in deficiency notice
June 30, 1939	$ 9,009.03	$ 7,663.81
June 30, 1940	89,672.03	71,202.36
June 30, 1941	122,176.80	94,924.71

The respondent has filed an amended answer in which he alleges that all of the depletion allowances claimed by the petitioner in respect of the "dump" ores should be disallowed and that the deficiencies as determined in the deficiency notice should be increased accordingly. As so increased the deficiencies amount to $226.05 for 1939, $5,133.10 for 1940, and $9,879.94 for 1941.

It is stipulated that the deposits of dump ores on petitioner's properties and all rights in them have been at all times an unsevered part of the realty on which the petitioner's mine is located and that the portions of such deposits processed by petitioner during the taxable years were placed thereon prior to March 1, 1913, and so have never been subjected [72] to any depletion allowances in any returns filed by petitioner or prior owners of the property.

Each of the other three consolidated cases involes the identical question set out under issue (1) above. A stipulation of facts has been submitted in each case and we adopt the written stipulations as part of our findings of fact. The facts in each proceeding, in so far as they pertain to the question in issue, are the same in all material respects as those stated above. All of the petitioners, with the exception of Oat Hill Mine, Inc., owned the mines which they operated. That company operated under a sublease.

In determining the deficiency against Oat Hill Mine, Inc., the respondent disallowed the deduction of an item of $3,750 which that company paid

in 1940 to the Pacific Gas & Electric Co. for the extension of an electric line and the installation of transformers necessary to furnish electric current to its mine. The payment was made under a contract which provided that all of the equipment so used should remain the property of the electric company and that:

> If and whenever Applicant shall have operated the electrical apparatus originally installed by him or its equivalent, served from the equipment installed hereunder, for a period of thirty-six (36) consecutive months, and the Applicant's business shall at that time have proved its permanency to the entire satisfaction of the Company, and upon the execution of the proper agreements and the compliance by Applicant with all the conditions necessary to obtain permanent service pursuant to the Company's standard practice relative to the construction of electric line extensions in force at the end of said thirty-six months period, the Company shall repay to Applicant said contract price except such portion thereof as may be required as a line extension deposit under the Company's standard practice relative thereto, and said deposit shall thereafter be refunded in accordance therewith. [73]

OPINION

Smith, Judge: Our first question is the determination of the correct basis to be used in computing percentage depletion deductions on peti-

tioner's quicksilver mines. Petitioners contend that the correct basis is the market value of the mercury in flasks, as reflected in the gross sales of mercury in each of the taxable years. The respondent contends that it is the market value of the cinnabar ore, from which the mercury was obtained, at the mouth of the mines, arrived at by deducting from gross sales of mercury the cost of processing the ore, including furnacing, condensing, cleaning, flasking and transporting.

Section 23(m) of the Internal Revenue Code provides for a reasonable allowance for depletion, in the case of mines, to be made under rules and regulations to be prescribed by the Commissioner, and section 114(b)(4) allows percentage depletion in the case of metal mines in the amount of 15 percent of the gross income from the property. The Commissioner, in Regulations 103, section 19.23 (m)-1(f) states that gross income from the property means the selling price of the crude mineral product in the immediate vicinity of the mine, but that if the product is processed, or if there is no representative market, the market value of the crude mineral product is constructed by deducting costs from the first marketable product, except that the cost of certain processes are not deductible. The exception applicable to quicksilver is the cost of "crushing, concentrating (by gravity or flotation), and other processes to the extent to which they do not beneficiate the product in greater degree (in relation to the crude mineral product on the one hand and the refined product on the other)

than crushing and concentrating (by gravity or flotation)." [74]

Applying his regulations the respondent has computed petitioner's depletion deductions on gross sales of mercury less that portion of the cost of production, and a representative portion of the profits, attributable to furnacing, condensing, cleaning, flasking, and transporting the mercury.

The undisputed facts are that petitioners did not sell the crude mineral product (that is the cinnabar ore) in the vicinity of the mine, or elsewhere, and that there was no representative market value for such product. It was therefore necessary for the respondent in applying his regulations to construct a market value for the product, as he did. Our question then is, did the furnacing, condensing, cleaning, and flasking "beneficiate" the product to a greater degree than crushing and concentrating by gravity or flotation, so that the cost of those processes must be deducted from the gross sales in determining the market value of the product.

In mining parlance the term "beneficiate" means:

a. To reduce (ores).

b. To concentrate or otherwise prepare for smelting (esp. iron ore), as by drying, sintering, magnetic concentration, etc. (Webster's New International Dictionary, Second Ed.)

In the process of concentrating ores by the gravity method the crushed ore is placed on tables and agitated so that the higher and lower specific gravity elements are mechanically separated. In the

flotation method the crushed ore is mixed with oils in vats and agitated by means of steam or mechanical defices. The metallic particles rise as a froth on the oil and are then collected. The concentrating processes are usually followed by smelting. The evidence before us is that the cinnabar ore was not concentrated, either by the gravity or the flotation method, and that there was no process comparable thereto. The ore was fed into the furnaces as it emerged from the mine. [75]

The evidence is that, preliminary to furnacing, the cinnabar ore was crushed at the mines to a size of not more than two inches. A much finer crushing is required in the process of concentrating ores, especially by the flotation method where the ore is reduced to a powder form. If used in that sense in the regulations, as apparently it is, petitioners neither crushed nor cencentrated the cinnabar ore before furnacing.

According to the testimony of the witnesses in these proceedings it is physically possible to concentrate cinnabar ore either by gravity or flotation, but this was not done by petitioners or by the quicksilver mining industry anywhere in the United States at any time during the taxable years for the reason that it had been proven uneconomical. After concentrating the ore the other processes of furnacing, condensing, cleaning, and flasking were still necessary. From these facts it is reasonable to conclude, we think, that all of these processes, that is, furnacing, condensing, cleaning, and flasking beneficiated the product in a greater degree than

"crushing" and "concentrating" and therefore do not come within the excepted processes referred to in subsection (f)(4) of the regulations.

Perhaps, as petitioners argue, the regulations were not drafted to fit the particular conditions of quicksilver mining. Nevertheless the purpose of the regulations is clear. It is to compute the percentage depletion allowances for all types of mines on the basis of income attributable to the using up or the "depletion" of the mineral or metal products, as distinguished from the income attributable to the various processes utilized in preparing the product for the market. We can not say that in their plan for furtherance of that purpose the regulations are so contrary to the statute or so out of harmony with the meaning and purpose of the statute as to be invalid. See Commissioner v. Winslow, 113 Fed.(2d) 418, and cases there cited. [76]

Literally the statute provides that the depletion allowance shall be computed on a percentage of the "gross income from the property." Gross income is defined in section 22 of the Internal Revenue Code as:

> * * * gains, profits, and income derived from * * * trades, businesses, commerce, or sales, or dealings in property, whether real or personal, growing out of the ownership or use of or interest in such property; also from * * * the transaction of any business carried on for gain or profit, * * *

Section 19.22(a)-5 of Regulations 103, promulgated under the quoted provision of the Code, defines gross income as follows:

> Sec. 19.22(a)-5. Gross income from business. —in the case of a manufacturing, merchandising, or mining business, "gross income" means the total sales, less the cost of goods sold, plus any income from investments and from incidental or outside operations or sources. In determining the gross income substractions should not be made for depreciation, depletion, selling expenses, or losses, or for items not ordinarily used in computing the cost of goods sold.

See also Eisner v. Macomber, 252 U. S. 189; Merchants' Loan and Trust Co. v. Smietanka, 255 U. S. 509; Crews v. Commissioner, 89 Fed. (2d) 412.

In the case of oil and gas wells gross income from the property, for the purpose of computing depletion deductions, has been defined as that portion of the total profits from the sale of oil and gas which represents the fair market or field price at the mouth of the wells. Greensboro Gas Co. v. Commissioner, 79 Fed. (2d) 701; affirming 30 B.T.A. 1362; certiorari denied, 296 U.S. 639; Consumers Natural Gas Co. v Commissioner, 78 Fed. (2d) 161. See also Helvering v. Twin Bell Oil Syndicate, 293 U.S. 312; Helvering v. Mountain Producers Corp., 303 U.S. 376 In Anderson v. Helvering, 310 U.S. 404, it was said that: [77]

> Oil and gas reserves like other minerals in place, are recognized as wasting assets The production of oil and gas, like the mining of ore,

> is treated as an income-producing operation, not as a conversion of capital investment as upon a sale, and is said to resemble a manufacturing business carried on by the use of the soil. * * * (Citing cases). The depletion effected by production is likened to the depreciation of machinery or the using up of raw materials in manufacturing. * * * (Citing cases) The deduction is therefore permitted as an act of grace and is intended as compensation for the capital assets consumed in the production of income through the severance of the minerals. * * * The granting of an arbitrary deduction, in the interests of convenience, of a percentage of the gross income derived from the severance of oil and gas, merely emphasizes the underlying theory of the allowance as a tax-free return of the capital consumed in the production of gross income through severance. * * *

In Brea Cannon Oil Co. v. Commissioner, 77 Fed. (2d) 67; certiorari denied, 296 U. S. 604, the court held, affirming 29 B.T.A. 1134, that 60 percent of the gross receipts from the sale of casinghead gas represented the cost of processing, by which the casinghead gas was separated from the wet gas with which it was mixed as it emerged from the well, and did not constitute "gross income of the property" for the purpose of determining percentage depletion deductions. The court said in that case:

> While the act of Congress and regulations adopted in pursuance thereof must be construed according to the plain import, it should be borne

> in mind in determining the amount of the depletion allowance that such allowance is intended to represent the amount of capital recovered in the product produced by the well, that is the value of the raw product. * * *

We think that the result which the respondent has reached here by applying his regulations comports with the purpose of section 114(b)(4) I.R.C. as that section has been construed by the courts. The position taken by the petitioners that their percentage depletion on quicksilver mines should be computed upon the total gross sales of mercury as finally processed is, we think, contrary to the purpose of the statute. [78]

The second issue involves the question of the right of petitioner, New Idria Quicksilver Mining Co., to include in the basis for computing depletion deductions in each of the taxable years the income derived from the sale of mercury extracted from the dump ores which it processed during each of such years.

This question is controlled, we think, by the opinion of the Circuit Court of Appeals for the Tenth Circuit in Atlas Milling Co. v. Jones, 115 Fed. (2d) 61, and the opinions of this Court in Carl M. Britt, 43 B.T.A. 254, and Consolidated Chollar Gould & Savage Mining Co., 46 B.T.A. 241 Depletion deductions on dump ores or "tailings" claimed by the taxpayers in those cases were disallowed on the grounds that such deposits are not "mines" and that they do not represent a depletable interest in the

hands of the owner. Although the facts in the instant case differ somewhat from those in the cited cases we think that the same principle governs. In the Atlas Milling Co. case, supra, and in the Carl M. Britt case, supra, the taxpayers were lessees who had acquired, by contract, the right to process the dump ores which had been deposited on the premises of the lessors. In Consolidated Chollar Gould & Savage Mining Co., supra, the dump ores had been deposited on the taxpayer's land by others prior to its acquisition by the taxpayer. The only difference between the facts in that case and those in the instant case is that here the dump ores originally came from the mine located on the taxpayers's property rather than from the properties of others. In this respect the facts in this case resemble those in Kennedy Mining and Milling Co., 43 B.T.A. 617, where we held, distinguishing the Atlas and the Britt cases, supra, that the taxpayer was entitled to include in its basis for computing percentage depletion deductions the income from processing dump ores which it had [79] taken from its own mine during its ownership and operation of the mine. We said that:

> * * * The economic interest of this petitioner in the tailings and in the minerals to be extracted therefrom was identical with the interest it had maintained through its ownership of the mine from beginning to end of the extractive process; and when it finally received the proceeds of the minerals contained in the tailings it received income from the contents of the mine to exactly the same extent as the income

it had previously received from the earlier and more rudimentary refining process. It follows that respondent's disallowance of petitioner's claim was error and should be reversed.

That is not the situation here. The income which petitioner received from processed dump ores was not income from the operation of its mine. The dump ores had been removed from the mine long before the petitioner acquired the property and were not a part of the mine at any time during petitioner's ownership. The evidence does not show that any value was attributed to the dump ores as separate property in petitioner's acquisition of the mine or that they had any cost to the petitioner. In these circumstances we think that petitioner's claim for a percentage depletion allowance based on the income received from processing the dump ores must be denied.

The remaining question for determination involves the payment of $3,750 which Oat Hill Mine, Inc., made during the taxable year 1940 to Pacific Gas and Electric Co. representing the cost of an extension of a power line to its mine. Petitioner claimed the deduction of the entire amount of the payment in its return for 1940 as an ordinary and necessary business expense. It now contends that it is entitled to the deduction either of the full amount as claimed in its return, or in the alternative, to an aliquot portion thereof spread ratably over the anticipated use of the facilities. The respondent contends that no part of the expenditure is deductible in the taxable year 1940. We think that the respondent's posi-

tion is sound. Where the benefits [80] obtained from an expenditure extend over a period of one year or less the amount is usually deducted in full in the year of payment, other conditions of the statute authorizing the deduction being met. If they extend for a longer period the cost of the facilities may require spreading over the period of their expected use.

The facts here are that the petitioner made the payment in question under a contract which provided that the whole amount, except for the normal consumer's deposit, would be returned to it at the end of a three-year period, provided certain conditions should be met. There was no way of knowing at the time of the payment, or at any time during the taxable year, whether those conditions would be met and whether the amount would ever be refunded.

In any event it seems to us that the expenditure was in the nature of a capital investment, since the benefit to be derived from it was to extend over the entire period of petitioner's operations. In Duffy v. Central Raailroad Co. of New Jersey, 268 U. S. 55, the Supreme Court said of expenditures made by the lessee of railroad properties for additions and betterments under a long-term lease that:

> Clearly the expenditures were not "expenses paid within the year in the maintenance and operation of its (respondent's) business and properties;" but were for additions and bet-

terments of a permanent character, such as would, if made by an owner, come within the proviso in subdivision Second, "that no deduction shall be allowed for any amount paid out for new buildings, permanent improvements, or betterments made to increase the value of any property, etc." They were made, not to keep the properties going, but to create additions to them. They constituted, not upkeep, but investment; —not maintenance or operating expenses, deductible under subdivision First, section 12(a), but capital, subject to annual allowances for exhaustion or depreciation under subdivision Second.

Under petitioner's contract with the electric company the equipment became the property of the latter. What petitioner actually acquired was a [81] contractual right to have electric current furnished at tis mine for an indefinite period. While the contract does not so provide we assume that petitioner was to pay the normal rate charged to other consumers and that it was entitled to the services as long as it should operate the mine, without any further outlay of capital. Even if petitioner should be regarded as having a capital investment in the facilities or in the contract itself we have no means of determining the period of their expected use by the petitioner on which to base any allowance for depreciation or exhaustion. Petitioner argues in its brief that the evidence shows an expected use of not more than three years and refers us to the following testimony of one of its witnesses:

Q. Looking at the situation as it appeared at the time you made this deposit with the Pacific Gas and Electric Company, what would you say was the then apparent life of the operation?

A. As long as the war, which might have been three years, possibly less at that time.

This evidence is much too indefinite and speculative to support an allowance for depreciation or exhaustion of capital assets. The probable duration of the war in 1940, even as today, was a matter on which the best informed persons widely disagreed. It is not explained either why petitioner's operations were expected to continue only for the duration of the war. We do not have petitioner's lease before us and do not know the length of its term. So far as the evidence shows, the mine is still being operated, although it is stipulated that petitioner was dissolved as a corporate entity under the laws of the State of California in December 1941. The respondent has determined no deficiency against Oat Hill Mine, Inc., for 1941.

On the evidence available we think that petitioner has failed to establish its claim for a deduction of all or any portion of the expenditure in question in the taxable year 1940.

Decisions will be entered under Rule 50. [82]

The Tax Court of the United States
Washington

Docket No. 112386

NEW IDRIA QUICKSILVER MINING COMPANY,

Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

DECISION

Pursuant to the Court's Opinion, promulgated July 14, 1943, the respondent herein having filed a recomputation of tax on August 10, 1943, and petitioner having filed an acquiescence therein on August 10, 1943, now, therefore, it is

Ordered and Decided: That there are deficiencies in income tax of $107.22, $4,883.21, and $9,879.94 for the fiscal years ended June 30, 1939, June 30, 1940, and June 30, 1941, respectively.

[Seal] (Sgd) CHARLES P. SMITH
Judge

Entered Aug. 13, 1943. [83]

The Tax Court of the United States
Washington

Docket No. 112387

KLAU MINES, INC.,

Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

DECISION

Pursuant to the Court's Opinion, promulgated July 14, 1943, the respondent herein having filed a recomputation of tax on August 10, 1943, and petitioner having filed an acquiescence therein on August 10, 1943, now, therefore, it is

Ordered and Decided: That there is a deficiency in income tax of $3,834.70 for the calendar year 1940, and that there is no deficiency in declared value excess profits tax for the calendar year 1940.

[Seal] (Sgd) CHARLES P. SMITH
Judge.

Entered Aug 13 1943. [83a]

The Tax Court of the United States
Washington

Docket No. 112388

OAT HILL MINE, INC.,

Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

DECISION

Pursuant to the Court's Opinion, promulgated July 14, 1943, the respondent herein having filed a recomputation of tax on August 10, 1943, and petitioner having filed an acquiescence therein on August 10, 1943, now, therefore, it is

Ordered and Decided: That there is a deficiency in income tax of $2,025.10 for the calendar year 1940.

[Seal] (Sgd) CHARLES P. SMITH
Judge.

Entered Aug. 13 1943. [83b]

The Tax Court of the United States
Washington

Docket No. 112389

WILD HORSE QUICKSILVER MINING CO.
Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

DECISION

Pursuant to the Court's Opinion, promulgated July 14, 1943, the respondent herein having filed a recomputation of tax on August 10, 1943, and petitioner having filed an acquiescence therein on August 10, 1943, now, therefore, it is

Ordered and Decided: That there is a deficiency in income tax of $1,344.63 for the fiscal year ended September 30, 1940.

[Seal] (Sgd) CHARLES P. SMITH
Judge.

Entered Aug. 13 1943. [83c]

In the United States Circuit Court of Appeals
For the Ninth Circuit

Docket No. 112386

NEW IDRIA QUICKSILVER MINING COMPANY, a corporation,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

PETITION FOR REVIEW

To the Honorable Judges of the United States Circuit Court of Appeals for the Ninth Circuit:

The Petitioner, New Idria Quicksilver Mining Company, files this petition in pursuance of the provisions of Section 1142 of the Internal Revenue Code, and asks a review of the decision of the United States Tax Court entered on the 13th day of August, 1943, approving Respondent's assessment of a deficiency in income taxes of petitioner for the respective corporate years ending June 30, 1939 in the amount of $107.22, June 30, 1940 in the amount of $4,883.21, and June 30, 1941 in the amount of $9,879.94. [84]

In support of this petition, petitioner respectfully shows to this Honorable Court:

I.

STATEMENT OF THE NATURE OF THE CONTROVERSY

The nature of the controversy involves an appeal from a redetermination by the Commissioner of Internal Revenue of income taxes of petitioner based on the contention that petitioner had incorrectly computed percentage depletion on income from its quicksilver mine located in San Benito County, California, in making its income tax returns for each of the above-mentioned fiscal years.

II.

DESIGNATION OF COURT OF REVIEW

Petitioner is a corporation organized under the laws of the State of Nevada, duly domiciled and having its principal place of business in the City and County of San Francisco, State of California, and being aggrieved by the said Findings of Fact, Opinion, Decision and Order, asks a review thereof in accordance with the provisions of the Revenue Act of 1926 and the Acts amendatory thereof and supplemental thereto, by the United States Circuit Court of Appeals for the Ninth Circuit within which circuit is located the office of the Collector of Internal Revenue for the First District of California with whom the petitioner made and filed its returns of income and excess profits taxes. [85]

III.

ASSIGNMENTS OF ERROR

Petitioner, as a basis for review, makes the following assignments of error:

1. The Tax Court erred in upholding the Commissioner's method of computing allowable depletion on the properties owned by petitioner for each of the fiscal years in question.

2. The Tax Court erred in upholding the Commissioner's contention that the depletion allowed by him for each of the fiscal years in question was based by him on 15% of the gross income from the property, or 50% of the net income therefrom, whichever was lower, as used in United States Revenue Code Section 114-b.

3. The Tax Court erred in upholding the Commissioner's failure to determine the fair market value of the first marketable product from petitioner's mine as constituting the gross income as a basis for the purpose of computing percentage depletion under the provision of Regulation 103 of the Bureau of Internal Revenue, Section 1923(m)-1, for each of the fiscal years in question.

4. The Tax Court erred in holding as a basis for the deduction specified in the foregoing assignments that quicksilver ore was the first marketable product derived from petitioner's operations, whereas it appears from the undisputed facts in the record that quicksilver metal or mercury was and is the first marketable product derived from said operations. [86]

5. The Tax Court erred in not accepting as the gross income from said property as a basis for the purpose of computing percentage depletion allowance to petitioner in its income tax return the gross return from sales of mercury derived from said properties, as shown by undisputed facts in the record, for each of the said fiscal years in question.

6. The Tax Court erred in upholding the ruling of the Commissioner to the effect that the gross income from petitioner's property during each of said fiscal years in question should be determined by deducting from the gross proceeds of sales of metal the amounts claimed by the Commissioner, or any other amounts, representing the cost of furnacing, condensing, cleaning and flasking the ores extracted from petitioner's mine, and separate error is alleged as to each of said items of deduction.

7. The Tax Court erred in subtracting from the gross income to petitioner from sales of quicksilver metal from petitioner's property during each of said fiscal years in question the amount claimed by the Commissioner, or any other amount, purporting to represent the proportion of petitioner's operating profit alleged to have been derived from the operations of furnacing, condensing, cleaning and flasking said ores extracted from petitioner's property, or the metal contained therein, or from any of said items.

8. The Tax Court erred in assuming as a basis for said deduction that any profit whatever was derived by petitioner from the operations of fur-

nacing, cleaning, condensing and [87] flasking of quicksilver ore mined and extracted from petitioner's property during the period in question, and in failing to assume that such profit as petitioner derived from such operations was ascribable wholly to the existence of quicksilver ore in petitioner's mine and of an open market for the metal extracted therefrom and processed thereon.

9. The Tax Court erred in sustaining the Commissioner's contention that the gross income from the property as defined by the United States Revenue Code, Section 114-b, as a basis for percentage depletion, can be ascertained by arbitrarily adding to the cost of mining and crushing ore extracted therefrom a percentage of the net profit from sales equal to the proportion that the cost of mining and crushing bore to the total cost of mining, crushing, furnacing, condensing, cleaning, flasking, and transporting the metal to market, and all other costs of operation.

10. The Tax Court erred in sustaining the Commissioner's ruling that petitioner was not entitled to claim percentage depletion on the income from ore mined and extracted from dumps on petitioner's property, which dumps contained ore extracted from the identical property on which said dumps were located which was originally mined by petitioner's predecessors in interest from said property and as to which no depletion allowance had ever been previously claimed, either by petitioner or by its predecessors in interest. [88]

Wherefore, your petitioner prays that this Hon-

orable Court may review such findings, decision, opinion, and order of said Tax Court and reverse and set aside the same, and that the Clerk of said United States Tax Court be directed to transmit and deliver to the Clerk of this Court certified copies of all and every documents necessary and material to the presentation and consideration of the foregoing petition for review and as required by the rules of said Court and the statutes made and provided.

ROBERT M. SEARLS
Attorney for Petitioner

[Endorsed]: T.C.U.S. Filed Oct. 12, 1943.

[Clerk's Note: A separate Petition for Review was filed by each of the petitioners Klau Mine, Inc., Oat Hill Mine, Inc., and Wild Horse Quicksilver Mining Co. in their respective causes on October 12, 1943.] [89]

The Tax Court of the United States

Docket No. 112386

In the Matter of:

NEW IDRIA QUICKSILVER MINING COMPANY, a corporation,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

NOTICE OF INTENTION TO FILE PETITION FOR REVIEW

To J. P. Wenchel, Chief Counsel, Bureau of Internal Revenue, Washington, D. C.,
Attorney for Respondent:

Sir:

Please take notice that on the 12th day of October, 1943, the undersigned will present to this Court and file with the clerk thereof, the petition of New Idria Quicksilver Mining Company, a corporation, a copy of which is annexed hereto, for the review by the United States Circuit Court of Appeals for the Ninth Circuit, of the final order and decision of the Tax Court in the above entitled proceeding entered upon the records of said court on the 13th day of August, 1943.

ROBERT M. SEARLS
Attorney for Petitioner
705 Standard Oil Building
San Francisco, California

A copy of the within notice and copy of petition for review is hereby accepted this 12th day of October, 1943.

J. P. WENCHEL
Chief Counsel,
Bureau of Internal Revenue

[Endorsed]: T.C.U.S. Filed Oct. 12, 1943. [90]

[Title of Tax Court and Cause.]

Docket No. 112386

PRAECIPE FOR TRANSCRIPT OF RECORD

To the Clerk of The Tax Court of the United States:

You are requested by petitioner to take and certify a transcript of record to be filed in the United States Circuit Court of Appeals for the Ninth Circuit, pursuant to review taken in the above entitled cause, and to include in such transcript of record copies, duly certified as correct, of the following documents:

1. The docket entries or proceedings before the Board.
2. Pleadings before the Board.
   a. Petition.
   b. Amended Answer of Respondent.
3. Transcript of the hearing.
   a. Stipulation as to facts entered into between the parties and filed on hearing of the cause, and exhibits.

b. Statement of evidence in addition to the above stipulation, together with oral motions made at said hearing, and ruling thereon, and exhibits, if any.

4. Memorandum opinion of the Court.

5. Order of redetermination entered on the 13th day of August, 1943.

6. Petition for Review. [91]

a. Notice of filing thereof with proof of service.

7. This praecipe.

The foregoing to be prepared, certified and transmitted as required by law and the rules of the United States Circuit Court of Appeals for the Ninth Circuit.

ROBERT M. SEARLS
Attorney for Petitioner

I hereby consent to the foregoing praecipe.

(Sgd) J. P. WENCHEL
CAK
Bureau of Internal Revenue
Attorney for Commissioner of Internal Revenue

[Endorsed]: T.C.U.S. Filed Oct. 12, 1943. [92]

[Title of Tax Court and Cause.]

Docket No. 112386

NOTICE OF FILING PRAECIPE

To J. P. Wenchel, Chief Counsel, Bureau of Internal Revenue, Washington, D. C.
Attorney for Respondent:

Please Take Notice that on the 12th day of October, 1943, we filed with the Clerk of the Board of Tax Appeals a praecipe designating the portions of the record to be transmitted to the Circuit Court of Appeals for the Ninth Circuit on review taken in the above cause, a copy of which praecipe is hereto annexed and herewith served upon you.

ROBERT M. SEARLS
Attorney for Petitioner.

Service of the foregoing Notice, and copy of the attached praecipe is hereby acknowledged this 12th day of October, 1943.

J. P. WENCHEL
C.A.R.
Chief Counsel,
Bureau of Internal Revenue,
Attorney for Respondent.

[Endorsed]: T.C.U.S. Filed Oct. 12, 1943. [93]

The Tax Court of the United States
Washington

Docket No. 112386

NEW IDRIA QUICKSILVER MINING COMPANY, a corporation,

Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE

Respondent.

CERTIFICATE OF CLERK TO TRANSCRIPT OF RECORD

I, B. D. Gamble, clerk of The Tax Court of the United States do hereby certify that the foregoing pages, 1 to 93, inclusive, contain and are a true copy of the transcript of record, papers, and proceedings on file and of record in my office as called for by the Praecipe in the appeal (or appeals) as above numbered and entitled.

In testimony whereof, I hereunto set my hand and affix the seal of The Tax Court of the United States, at Washington, in the District of Columbia, this 19th day of October, 1943.

[Seal] B. D. GAMBLE
Clerk,
The Tax Court of the United States.

[Endorsed]: Nos. 10589, 10590, 10591, 10592. United States Circuit Court of Appeals for the Ninth Circuit. New Idria Quicksilver Mining Company, a Corporation, Petitioner, vs. Commissioner of Internal Revenue, Respondent. Klau Mine, Inc., a Corporation, Petitioner, vs. Commissioner of Internal Revenue, Respondent. Oat Hill Mine, Inc., a Corporation, Petitioner, vs. Commissioner of Internal Revenue, Respondent. Wild Horse Quicksilver Mining Co., a Corporation, Petitioner, vs. Commissioner of Internal Revenue, Respondent. Transcripts of the Record. Upon Petitions to Review Decisions of the Tax Court of the United States.

Filed October 25, 1943.

PAUL P. O'BRIEN

Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

In the United States Circuit Court of Appeals
For the Ninth Circuit
Consolidated Dockets

No. 10,589

NEW IDRIA QUICKSILVER MINING COMPANY (a corporation)
Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

No. 10,590

KLAU MINE, INC. (a corporation),
Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

No. 10,591

OAT HILL MINE, INC. (a dissolved corporation),
Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

No. 10,592

WILD HORSE QUICKSILVER MINING COMPANY (a dissolved corporation)

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

STIPULATION AND ORDER FOR CONSOLIDATION OF CASES FOR PRINTING OF RECORD, BRIEFING AND DECISION

Whereas, duly certified records on appeal have been filed in the office of the Clerk of the United States Circuit Court of Appeals for the Ninth Circuit in the above entitled matters; and

Whereas, the points on appeal relied upon by petitioner in the case entitled New Idria Quicksilver Mining Company v. Commissioner of Internal Revenue (Docket No. 10,589), hereinafter called the "New Idria case," include all of the points which are relied upon in the other three cases, with the exception of one point made in the case of Oat Hill Mine, Inc. v. Commissioner of Internal Revenue (Docket No. 10,591); and

Whereas, said causes were consolidated for hearing and decision in the Tax Court of the United States, and a single opinion and findings was entered by that court in all four of said cases; and

Whereas, pursuant to stipulation between counsel for petitioner and respondent below, the entire rec-

ord of oral testimony at the hearing before the Tax Court has been reduced to narrative form and, together with the opinion of the Tax Court, has been included and certified to this court in the record in the New Idria case, with cross references thereto by copies of the stipulation incorporated in each of the records in the other three cases; and

Whereas, by reason of the foregoing matters it appears to undersigned counsel that the court will be able to decide all four of said cases upon a consolidated printed record including the record in the New Idria case, supplemented by the excerpts from the records of the other three cases above mentioned which are referrd to in this stipulation, and substantial and needless expense will be saved to the petitioners if only one such record is printed under the circumstances, and if the cases are consolidated for briefing and decision;

Now, Therefore, in consideration of the premises,

It Is Hereby Stipulated that the Circuit Court of Appeals for the Ninth Circuit may make and enter an order:

(1) Consolidating said cases for briefing and decision;

(2) Directing that the records in said cases may be consolidated for printing and that only the record in Docket No. 10,589, entitled New Idria Quicksilver Mining Company v. Commissioner of Internal Revenue, shall be printed, together with the following excerpts from the records in the remaining cases, viz.:

Docket No. 10,590—Klau Mine, Inc.:

Paragraphs 10 and 11 from the Stipulation of Facts and the final decision of the Tax Court fixing the amount of the tax deficiency;

Docket No. 10,591—Oat Hill Mine, Inc.:

Paragraphs 10, 11, and 12, and Exhibit "B" to the Stipulation of Facts and the final decision of the Tax Court, fixing the amount of tax deficiency;

Docket No. 10,592—Wild Horse Quicksilver Mining Company:

Paragraphs 10 and 11 from the Stipulation of Facts and the final decision of the Tax Court, fixing the amount of tax deficiency;

(3) That the court, in deciding said cases, need not consider portions of the certified records in Dockets Nos. 10,590, 10,591, and 10,592 which are not printed in the consolidated record on appeal, unless counsel for either party, by printing such excepted portions in their briefs, or some excerpts therefrom, direct the court's attention to matters omitted from the printed record, and that the court need not deem it necessary in deciding the cases to consider any portion of the record not printed in the consolidated record.

Dated: November 1, 1943.

ROBERT M. SEARLS
705 Standard Oil Building,
San Francisco 4, California.
Attorney for Petitioners
SAMUEL O. CLARK JR.
Attorney for Respondent

Pursuant to the foregoing Stipulation

It Is So Ordered by the Court.

Dated: Nov 5 1943.

FRANCIS A. GARRECHT
U. S. Circuit Judge

[Endorsed]: Filed Nov. 5, 1943. Paul P. O'Brien, Clerk.

[Title of Circuit Court of Appeals and Causes.]

PETITIONER'S DESIGNATION OF RECORD TO BE PRINTED IN THE RECORD ON APPEAL

The petitioner above named, having taken an appeal to the United States Circuit Court of Appeals for the Ninth Circuit from the judgment of The Tax Court of the United States rendered in each of the above entitled cases, pursuant to stipulation of counsel and order of court consolidating the above entitled cases for printing of record, briefing and decision, designates all of the record on appeal in Docket No. 10,589 for printing, and, in addition thereto, said stipulation, the portions of records

in Dockets Nos. 10,590, 10,591 and 10,592 referred to therein, and this Designation of Record.

Dated: November 1st, 1943.

ROBERT M. SEARLS
705 Standard Oil Building,
San Francisco 4, California
Attorney for Petitioners

Service of the within Designation of Record to Be Printed in the Record on Appeal admitted this 1st day of November, 1943.

SAMUEL O. CLARK, JR.
Attorney for Respondent

[Endorsed]: Filed Nov. 5, 1943. Paul P. O'Brien, Clerk.

[Title of Circuit Court of Appeals and Causes.]

STATEMENT OF POINTS RELIED UPON BY PETITIONER ON APPEAL

A. In All the Above Entitled Cases:

Petitioner assigns the following as the statement of points upon which it intends to rely on appeal, namely:

(1) The Tax Court of the United States erred in upholding the Commissioner's method of computing allowable depletion on the properties owned by petitioner for each of the taxable years in question.

(2) The Tax Court erred in upholding the Commissioner's contention that the depletion allowed

by him for each of the taxable years in question was based by him on 15 per cent of the gross income from the property, or 50 per cent of the net income therefrom, whichever was lower, as required by United States Revenue Code Section 114-b.

(3) The Tax Court erred in upholding the Commissioner's failure to determine the fair market value of the first marketable product from petitioner's mine as constituting the gross income from the property as a basis for computation of percentage depletion under the provisions of Regulations 103 of the Bureau of Internal Revenue, Section 19.23 (m)-1 for each of the taxable years in question.

(4) The Tax Court erred in holding as a basis for the deduction specified in the foregoing assignments that quicksilver ore was the first marketable product derived from petitioner's operations, whereas it appears from the undisputed facts in the record that quicksilver metal or mercury was and is the first marketable product derived from said operations.

(5) The Tax Court erred in not accepting as the gross income from said property as a basis for the purpose of computing percentage depletion allowance to petitioner in its income tax return the gross return from sales of mercury derived from said properties, as shown by undisputed facts in the record, for each of the said taxable years in question.

(6) The Tax Court erred in upholding the ruling of the Commissioner to the effect that the gross

income from petitioner's property during each of said taxable years in question should be determined by deducting from the gross proceeds of sales of metal the amounts claimed by the Commissioner, or any other amounts, representing the cost of furnacing, condensing, cleaning and flasking the ores extracted from petitioner's mine, and sperate error is alleged as to each of said items of deduction.

(7) The Tax Court erred in subtracting from the gross income to petitioner from sales of quicksilver metal from petitioner's property during each of said taxable years in question the amount claimed by the Commissioner, or any other amount, purporting to represent the proportion of petitioner's operating profit alleged to have been derived from the operations of furnacing, condensing, cleaning and flasking said ores extracted from petitioner's property, or the metal contained therein, or from any of said items.

(8) The Tax Court erred in assuming as a basis for said deduction that any profit whatever was derived by petitioner from the operations of furnacing, cleaning, condensing and flasking of quicksilver ore mined and extracted from petitioner's property during the period in question, and in failing to assume that such profit as petitioner derived from such operations was ascribable wholly to the existence of quicksilver ore in petitioner's mine and of an open market for the metal extracted therefrom and processed thereon.

(9) The Tax Court erred in sustaining the Commissioner's contention that the gross income from

the property as defined by the United States Revenue Code, Section 114-b, as a basis for percentage depletion, can be ascertained by arbitrarily adding to the cost of mining and crushing ore extracted therefrom a percentage of the net profit from sales equal to the proportion that the cost of mining and crushing bore to the total cost of mining, crushing, furnacing, condensing, cleaning, flasking, and transporting the metal to market, and all other costs of operation.

B. In Docket No. 10,589 Only:

(10) The Tax Court erred in sustaining the Commissioner's ruling that petitioner was not entitled to claim percentage depletion on the income from ore mined and extracted from dumps where it appeared without dispute that said dumps were situated on petitioner's property and contained ore previously mined from the identical property on which they were situated by petitioner's predecessor in title to said property and as to which ore no depletion had ever been previously claimed either by petitioner or by any of its predecessors in interest.

C. In Docket No. 10, 591 Only:

(11) The Tax Court erred in sustaining the Commissioner's ruling that petitioner was not entitled to claim deduction as an operating expense during said taxable year in the sum of $3,750.00 representing a payment made to Pacific Gas and Electric Company as a payment for power service.

Dated: November 1st, 1943.

ROBERT M. SEARLS
705 Standard Oil Building
San Francisco, California
Attorney for Petitioner

Service of the within Statement of Points Relied Upon by Petitioner, admitted this 1st day of November, 1943.

SAMUEL O. CLARK, Jr.
Attorney for Respondent

[Endorsed]: Filed Nov. 5, 1943. Paul P. O'Brien, Clerk.